Jurisdictional Statement

81-1356

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No. ——

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CLIFFORD JONES,

Appellant,

v.

WILLIAM M. MORRIS, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, Western Division

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

A. Does the United States Constitution require the State of Ohio to permit a teacher to present his case, via oral or written argument, to the final decision maker, board of education, before his employment contract is terminated?

B. Does the Constitution require that in a teacher termination case, the final decision maker review a fair summary or transcript of the evidence or otherwise acquire an adequate understanding of both sides of the controversy prior to its determination?

C. Is Ohio Rev. Code § 3319.16 unconstitutional because it fails to provide that a terminated teacher receive a meaningful hearing before the final decision maker?

D. Did defendant board of education apply Ohio Rev. Code § 3319.16 so as to deprive plaintiff of his employment contract without due process of law?

II.

PARTIES IN THE DISTRICT COURT

Clifford Jones was the only plaintiff in the district court. The only defendant in the district court was the Mt. Healthy City School District Board of Education; other individual defendants had been previously dismissed.[1]

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[1] The district court caption retained the names of the dismissed individual defendants, William M. Morris, *et al.*

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JURISDICTIONAL STATEMENT

Plaintiff alleges his teaching contract was terminated in violation of the 14th Amendment to the United States Constitution. The three judge district court held that the Ohio statute was constitutional and that plaintiff was not denied due process of law. However, plaintiff had no opportunity to present his side of the controversy to the final agency decision maker – the board of education. The district court decision, departing from well-settled concepts of constitutional and administrative law should be given plenary review by this Court.

OPINIONS BELOW

The three judge district court opinion which is being appealed in *Clifford Jones* v. *William Morris, et al.*, No. 8785 (U.S. District Court for the Southern District of Ohio, Western Division, filed August 28, 1981) and is unpublished (App. 2a).[2] The decisions of the referee recommending termination of plaintiff and the board of education terminating plaintiff's contract and denying him a hearing are contained in (App. 28a, 34a, 36a, & 38a). The opinions of the Court of Common Pleas, Hamilton County, Ohio and of the Supreme Court of Ohio in *Jones* v. *Board of Education* are unpublished and are contained in (App. 39a & 52a). The decision of the Court of Appeals for Hamilton County, decided August 16, 1978, is published at 60 Ohio App. 2d 138 (1978) and is set forth in (App. 47a).

JURISDICTION

This appeal challenges the constitutionality of the teacher termination procedures under Ohio Rev. Code Ann. § 3319.16 (Page 1980 Replacement Vol.) Plaintiff seeks a declaration that the Ohio statute is unconstitutional on its face and as applied to the facts.[3] The case was filed on April 12, 1973, in the United States District Court for the Southern District of Ohio, Western Division under 28

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[2] Appellant has filed a separate appendix to this Jurisdictional Statement. All references to pages in the separate appendix are designated (App. —).

[3] This Court has jurisdiction over plaintiff's claim that the statute as applied to plaintiff is unconstitutional even though the statute, in general might be held to be generally valid on its face. *Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971).

U.S.C. § 1343 seeking a remedy under 42 U.S.C. § 1983. The district court abstained to allow plaintiff to obtain an authoritative state court construction of Ohio Rev. Code § 3319.16. The state court interpreted the Ohio statute as not requiring a hearing before the board of education after a hearing before a referee. (App. 47A).

Subsequently, plaintiff returned to the United States District Court to pursue his constitutional claim that he had been denied due process. A three judge district court panel was convened under 28 U.S.C. § 2281 (repealed 1976). The case was submitted to the court on a stipulation of facts (App. 24a). On August 28, 1981, the district court denied plaintiff's claim for relief in an opinion and order (App. 2a). Notice of appeal of this final judgment was filed in the district court on October 26, 1981 (App. 21a). This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

"No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amendment XIV, § 1.

Ohio Rev. Code Ann. § 3319.16 (Page 1980 Replacement Vol.). This statute is set forth in full in the appendix to this brief (App. 22a).

STATEMENT OF THE CASE

Clifford Jones, plaintiff-appellant, was an elementary school teacher in the Mt. Healthy City School District, Hamilton County, Ohio, from 1955 until 1973. On April 5, 1973, plaintiff received notice of the school board's intent to terminate plaintiff's employment contract (App. 24a & 27a).

Pursuant to Ohio Rev. Code § 3319.16, the plaintiff requested an evidentiary hearing before a referee. (App. 24a). The hearing lasted for eight days in May and June 1973 (App. 24a). There were 20 witnesses, 90 exhibits and 1605 pages of transcript (App. 24a & 25a). The referee's report of the hearing contained only a 4¼ page discussion of the evidence (App. 28a). The referee recommended termination of plaintiff's contract because of alleged insubordination, involving his failure to prepare lesson plans and belligerence in a private meeting with his principal. Plaintiff claimed he had a good teaching record and was innocent of wrongdoing and that the real reason for his discharge was his union activities.

Plaintiff received the referee's report on Saturday, June 23, 1973 (App. 24a). The final decision maker concerning the termination was the Mt. Healthy Board of Education. At the board's meeting on Monday night, June 25, 1973, its lawyer, who prosecuted the case against the plaintiff, explained the referee's report to the board (App. 34a). Neither plaintiff nor his counsel were present at the meeting or were notified of the meeting. (App. 24a).

The board made its decision without reviewing plaintiff's objections to the referee report, without hearing plaintiff's version of the facts, and without knowledge of plaintiff's arguments as to why he should be retained as a teacher.

The board accepted the referee's recommendation and voted to terminate the plaintiff's contract (App. 24a & 34a). The board made its decision without access to the exhibits or transcript of testimony, which had not yet been typed (App. 25a, ¶ 13). The board's decision was based solely upon the skimpy referee report which did not contain a full summary of the evidence. The board heard no comment from the plaintiff prior to its determination.

On Monday, June 25, 1973, plaintiff's counsel wrote a letter to the board of education requesting a hearing and a copy of the record of the referee proceedings (App. 25a & 35a). Subsequently, plaintiff requested the board to review the transcript (App. 25a & 37a).

On August 9, 1973, the board advised plaintiff of its decision to deny him a hearing (App. 25a & 38a).

The plaintiff filed a statutory appeal of his termination in the Common Pleas Court, Hamilton County, Ohio. The court ruled that he had been denied a hearing before the board which was required by Ohio Rev. Code § 3319.16 (App. 39a). The Ohio Court of Appeals reversed, holding that the statute did not provide for a board hearing. The court held that the board had no duty to have the transcript available or give plaintiff the opportunity to file verbal or written objections to the referee report prior to the board's determination (App. 47a). The Supreme Court of Ohio held there was no substantial constitutional issue and dismissed plaintiff's appeal (App. 52a).

The three judge district court ruled that the Ohio statute was constitutional and the plaintiff had not been denied due process (App. 2a). On October 26, 1981, the plaintiff filed a notice of appeal to this Court with the district court (App. 21a).

ARGUMENT

THE QUESTIONS CONCERNING DUE PROCESS ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR THEIR RESOLUTION.

Introduction

In the late-1930's, this Court, in the *Morgan* cases, outlined the due process checks upon the otherwise unbridled excesses of administrative agencies.[4] Since then, there has been some erosion of the requirements of *Morgan*, during the decades when delegation of government responsibility to agencies was at its zenith. However, the courts have generally reaffirmed the application of the 14th Amendment to individuals and businesses deprived of property rights by the administrative agencies of local, state, and federal governments.

The opinion below, if followed by other courts, would represent a drastic break with the tradition of fair play which has prevailed during the past half century.

The district court creates an exception to the rule that before a property right is taken by an administrative agency, there must be "an opportunity to be heard at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545 (1965).

Ohio Rev. Code § 3319.16 allows the school board to extinguish a property right of a teacher without insuring that the board hears plaintiff's view of the controversy.

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[4] *Morgan* v. *United States* (*Morgan I*), 298 U.S. 468 (1936); *Morgan II*, 304 U.S. 1 (1938); *Morgan III*, 307 U.S. 183 (1939); and *Morgan IV*, 313 U.S. 409 (1941).

When a teacher has a termination hearing before a referee under Ohio Rev. Code § 3319.16, there is no guarantee that all the relevant evidence will reach the board of education, which decides the case. At the time it decided to terminate his contract, the board was never exposed to the facts and argument presented by plaintiff.

The proceedings lacked fundamental fairness as follows:

1. The board's decision was based solely upon a referee's report which was neither a complete nor adequate nor fair summary of the evidence.
2. The board made its decision without access to the transcript of the testimony and exhibits in the case.
3. The attorney who prosecuted the plaintiff participated in the board's deliberations at the *ex parte* meeting where plaintiff was terminated.
4. The board made its decision without prior notice and without granting plaintiff a hearing or permitting plaintiff to file objections to the referee's report or present oral argument to the board.

Any one of these procedural errors, standing alone, would be a sufficient denial of due process to warrant reversal of the proceedings.

Ohio Rev. Code § 3319.16 creates a property right by giving teachers protection from arbitrary termination of their contracts. This guarantee of job security cannot be withdrawn unless the requirements of procedural due process are met, *Perry* v. *Sindermann,* 408 U.S. 593 (1972).

The Ohio statute is constitutionally defective because it fails to provide safeguards to ensure that the board has an

adequate understanding of all the evidence — pro and con — concerning the case. As a result, plaintiff had no opportunity to present his side of the controversy to the final decision maker, and he lost his job.

The district court erred in its interpretation of the 14th Amendment.

It is time for this Court to once again reaffirm that administrative agencies can not deprive citizens of property rights without providing a fair and meaningful hearing.

I. SINCE THERE IS NO REQUIREMENT THAT THE DECISION TO TERMINATE BE BASED UPON THE EVIDENCE, OHIO REV. CODE § 3319.16 IS UNCONSTITUTIONAL.

It is well settled that the final decision maker in an administrative proceeding must obtain a substantial understanding of the record before adjudicating the case. This Court in *Morgan* v. *United States* (*Morgan I*), 298 U.S. 468, 481-82 (1936), held that:

> "[T]here must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, *the officer who makes the determinations must consider and appraise the evidence which justifies them.* That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred." (emphasis ours)

The phrase "the one who decides must hear" has not been interpreted literally. *Id.* at 481. But due process

does require that the decision making tribunal has access to the record. The deciding officers must "consider and appraise the evidence." *Id.* at 482. If a hearing officer or subordinate has taken testimony, there is a requirement that the final decision maker review an accurate and fair summary of all the evidence. K. Davis, *Administrative Law Treatise*, §§ 11.02-.04 (1958).

Ohio Rev. Code § 3319.16 contains no requirement that the referee give the board a summary of the evidence at the hearing. The statute permits the board to act on an incomplete and inadequate understanding of the record.

The statute provides that after the evidentiary hearing, "the referee shall file his report." (App. 22a). The statute goes on to state that "after consideration of the referee's report, the board by a majority vote may accept or reject the referee's recommendation on the termination of the teacher's contract." (App. 22a). Nowhere does the statute place any restrictions or commands upon the referee concerning "his report" or its content. There is no requirement that the referee summarize the arguments of each of the parties. The statute provides no protection against the board's consideration of *ex parte* or secret matter. There is no requirement that the board review the transcript of testimony. There is no opportunity for the parties to present their arguments to the board.

Thus, the board becomes a captive of the referee and must rely exclusively upon his "report," even if it is deficient. If the report does not summarize all the evidence and fails to review the positions of both parties, the board has no way to make an independent evaluation of the case. Since the referee is not required to summarize the facts contrary to his recommendation, the board has

no basis for rejecting the report and has no choice but to be a rubber stamp.

The statute fails to pass constitutional muster because it does not require the board to "consider and appraise the evidence" as required by *Morgan I*. Further, there is no way for the board to gain an understanding of the position of the party who seeks to reverse the referee. Thus, there is no meaningful hearing.

II. PLAINTIFF DID NOT RECEIVE DUE PROCESS BECAUSE THE DECISION TO TERMINATE WAS BASED SOLELY UPON AN INCOMPLETE AND INADEQUATE REPORT OF THE EVIDENCE.

The referee's hearing lasted eight days. Twenty witnesses testified. Yet, the referee's report contained only a few pages dealing with the 1605 pages of testimony and 90 exhibits.

The referee admits that some critical evidence was not cited to the board:

> "The following discussion of specific incidents is in no way intended to limit the consideration of the charges to the incidents discussed. The record is replete with numerous other incidents, but in the interests of brevity I have chosen the following for illustration." (App. 28a).

The report says that "Jones had good relations with his fellow teachers and was dedicated to his students," but fails to list the supporting evidence. (App. 33a). The report lacks information concerning the alleged insubordination.

There is a list of some, but not all of Jones' defenses to the charges. But the referee does not summarize the evidence in support of Jones' explanations. Also, there is no amplification of Jones' record as a good teacher, respected by pupils, fellow teachers and parents.

It is well settled that action of an administrative agency based upon a defective, incomplete report cannot be sustained. *Kwock Jan Fat* v. *White,* 253 U.S. 454 (1920); *Allied Compensation Insurance Co.* v. *Industrial Accident Commission,* 367 P.2d 409 (Cal. 1961); *O'Dea's Bar & Restaurant, Inc.* v. *New York State Liquor Authority,* 201 N.Y.S.2d 340 (Sup. Ct. 1960); *Falke* v. *Industrial Commission,* 116 N.W.2d 125 (Wis. 1962). In the case at bar, there was no way for the board to make an independent decision. It lacked the tools necessary for a reasoned and fair judgment: the written objections and oral arguments of both parties, a summary of the evidence at the hearing, and the transcript of testimony and exhibits. The skimpy one-sided conclusional report of the referee, standing alone, did not provide sufficient basis for the decision maker to make a fair determination.

III. THERE WAS NO DUE PROCESS SINCE THE OHIO STATUTE DENIES A TERMINATED TEACHER THE RIGHT TO A HEARING BEFORE THE FINAL DECISION MAKER, AND PLAINTIFF HAD NO OPPORTUNITY TO ARGUE ORALLY, SUBMIT OBJECTIONS, OR OTHERWISE PRESENT HIS VERSION OF THE RECORD TO THE BOARD.

The board adopted the referee's recommendations with lightning speed. The report was received on Saturday June 23, 1973, and acted upon within 72 hours. Plaintiff had no notice of the board meeting which decided his fate. Neither he nor his counsel attended. Plaintiff desired to object to the report. However, he had no chance to communicate with the board or argue orally. The Ohio statute contains no statutory requirement for a board hearing. There must be "'consideration" of the referee report, but there are no procedural safeguards to ensure a fair and objective review of the case by the board, which is the final decision maker.

The right of a party to challenge a hearing examiner's report before administrative action occurs is uniformly embodied in statutes, *e.g.*, the Federal Administrative Procedure Act., 5 U.S.C. § 557 (c). The right is also embodied in Section 11 of the Model State Administrative Procedure Act, 14 Uniform Laws Annotated at 416-17 (1980), which has been adopted by 29 jurisdictions, *Id.* at 29 (Supp. 1981). Furthermore, most of the 21 other states, which have not adopted the model act, have their own special administrative procedure acts, which provide for the right to file execeptions to hearing examiner's reports, *e.g.*, Ohio Rev. Code Ann. § 119.09 (Page Supp. 1980).[5]

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[5] This appeal does not fall within the Ohio Administrative Pro-

State courts have generally upheld the right to challenge a hearing examiner's report by filing exceptions prior to final agency action, 2 Am. Jur. 2d *Administrative Law* § 431 (1962). An illustrative decision is *Fifth Street Pier Corp.* v. *City of Hoboken,* 126 A.2d 6, 12 (N.J. 1956), where the court noted:

> "Due process requires that the litigant be allowed to make an impressionable contact with the powers of decision. This can only be realized by notifying the parties of the report and giving them an opportunity to file exceptions thereto, citing such portions of the record as bear on the issues raised for the individual consideration of the members of the [administrative board]."

Mazza v. *Cavicchia,* 105 A.2d 545, 555 (N.J. 1954), contains a scholarly analysis by Chief Justice Vanderbilt supporting the rule that the aggrieved should be given the opportunity to correct any mistakes that may appear in the report:

> "He has a right not only to refute but, what in a case like this is usually more important, to supplement, explain, and give different perspective to the hearer's view of the case."

The reason why a hearing is so critical was set forth in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123 (1951), where this Court noted that:

> "fairness can rarely be obtained by secret, one-sided determination of facts decisi[illegible] of rights. . . ."

A recent case is *Koniag, Inc.* v. *Andrus,* 580 F.2d 601 (D.C. Cir.), *cert. denied,* 439 U.S. 1052 (1978), where the

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cedure Act because a board of education is not defined as an "agency" under the act. *Id.* at § 119.01(A).

Secretary of Interior adopted the recommendation of an administrative law judge without notifying the appellant. The court held the "secret review process" was "inconsistent with constitutional restraints" noting:

> "[A]ffording the villages an opportunity to see the recommended decisions and to brief exceptions to them would cause only a slight delay in the proceedings. At the same time that opportunity would greatly enhance the participation of the Natives as well as the appearance of fairness so critical to the administrative process." 580 F.2d at 609

While proceedings in the case at bar were public and not secret, nevertheless, they were unknown to plaintiff. As in *Koniag,* there was the appearance of unfairness, especially since the prosecuting lawyer for the board was present during the board's deliberations whereas the lawyer for Jones was not notified and was absent.

IV. PLAINTIFF WAS TERMINATED WITHOUT DUE PROCESS SINCE THE STATUTE DID NOT REQUIRE THE FINAL DECISION MAKER TO HAVE THE TRANSCRIPT OF TESTIMONY AVAILABLE FOR REVIEW AND ITS DECISION WAS, THEREFORE, NOT BASED UPON THE EVIDENCE IN THE RECORD.

The Ohio statute requires that "[t]he board shall provide for a complete stenographic record of the proceedings, a copy of such record to be furnished to the teacher." (App. 22a). However, there is no requirement that the teacher receive his copy of the transcript prior to the board's decision. There is no requirement that the board members examine the transcript prior to their decision.

When the board made its decision, the transcript of 1605 pages had not yet been typed. The board had to rely exclusively upon the inadequate, incomplete, and short report of the referee. The board members had little knowledge of what happened at the hearing. They did not know what the 20 witnesses said, or what the 90 exhibits contained. They did not hear the arguments of counsel.

The plaintiff was unable to cite portions of the transcript favorable to his position and to show the board, by references to pages in the transcript, where the referee had erred in his conclusions concerning the evidence.

Numerous cases have held that when an administrative board adjudicates a case on the basis of a hearing examiner's report, due process requires that the transcript of the hearing at least be available to the board for review and as a check on any deficiencies in the examiner's report: *Walker* v. *DeConcini,* 341 P.2d 933, 938-39 (Ariz. 1959); *Weekes* v. *O'Connell,* 107 N.E.2d 290, 293-94 (N.Y. 1952);

Halley v. *Lavine,* 367 N.Y.S.2d 314 (App. Div. 1975); *Napuche* v. *Liquor Control Commission,* 58 N.W.2d 118 (Mich. 1953); and *Acitelli* v. *Westmont Hilltop School District,* 325 A.2d 490 (Pa. Commw. Ct. 1974). Where plaintiff had no opportunity for a hearing or the filing of exceptions with the board, board access to the hearing transcript was a constitutional necessity.

V. THE FUNDAMENTAL UNFAIRNESS OF THE PROCEEDINGS WAS COMPOUNDED BY THE PARTICIPATION OF THE PROSECUTING ATTORNEY IN THE DELIBERATIONS.

The lawyer who prosecuted the case against Jones at the referee hearing, explained the referee's report to the board and participated in the board's deliberations. The board minutes state:

> "Legal Counsel Phil Olinger reported on the findings and recommendations of Referee Larry A. Smith in regarding continuing contract of Clifford Jones. After Board discussion and consideration, Mrs. Clark moved to accept the findings and recommendations of Referee Larry A. Smith." (App. 34a).

The "'discussion and consideration" of the referee's report was brief. There is no evidence that the board members even read the report prior to its adoption. It can be inferred that the members' familiarity with the report came in part from the lawyer.

Neither plaintiff nor his lawyer was present at the meeting. Thus, there was no way to correct any misstatements made by Mr. Olinger. He wanted plaintiff to be terminated. His conflict of interest was obvious. His active

participation in the deliberations was one more obstacle preventing the board from obtaining an objective understanding of the case.

The cases have condemned such *ex parte* mixing of the prosecutorial and adjudicatory functions in similar circumstances: *Gonzales* v. *McEuen,* 435 F. Supp. 460, 464-66 (C.D. Cal. 1977); *Mack* v. *Florida State Board of Dentistry,* 296 F. Supp. 1259, 1262-63 (S.D. Fla. 1969), *modified,* 430 F.2d 862 (5th Cir. 1970), *cert. denied,* 401 U.S. 954, 960 (1971); and *White* v. *Board of Education,* 501 P.2d 358, 363 (Hawaii 1972).

VI. THE DECISION OF THE DISTRICT COURT IS CONTRARY TO THE WEIGHT OF AUTHORITY.

In *Kinsella* v. *Board of Education,* 378 F. Supp. 54 (W.D.N.Y. 1973), *aff'd orally,* 542 F.2d 1165 (2d Cir. 1976), a three judge court declared the New York teacher contract termination statute to be unconstitutional and held:

> "The statute does not require that the school Board's decision be based upon the record developed before the hearing panel. Indeed, there is no requirement that a transcript of the hearing panel proceedings even be sent to the school board, although it has been represented at oral argument that the school board may, if it so desires, order the transcript. While the school board does receive a hearing report which contains the findings and recommendations of the panel, that report does not contain even a summary of the evidence elicited at the hearing.
>
> Not only does the procedure outlined above fail to insure that the school board's decision will be based

> on evidence elicited at the hearing, it provides no safeguard against the school board's basing that decision on ex parte evidence. Furthermore, the problem is exacerbated by the fact that the school board is not required to render a written decision setting forth its reasoning and the factual basis for its decision." 378 F. Supp. at 59-60.

In *Ostrowski* v. *City of New York,* 601 F.2d 629 (2d Cir. 1979), the plaintiff attacked the commissioner's practice of relying solely upon a summary of the evidence prepared by a hearing officer, not reviewing the transcript, and not permitting a hearing in discipline cases. The court relied upon *Kinsella* and held:

> "Since the decision maker (the Commissioner) did not have a complete record of the hearing in these disciplinary proceedings and since the affected employees had no opportunity to see and comment on the hearing officer's summary of the record and his recommendation, we think appellants' due process challenge is a grave one." 601 F.2d at 631.

In *Tulsa Classroom Teachers Association, Inc.* v. *State Board of Equalization,* 601 P.2d 99 (Okla. 1979), an examiner heard a complaint about real estate taxes. Plaintiff had no opportunity to present written objections or oral argument to the decision-maker board. The court held:

> "It is essential to fair play and to minimize the risk of fundamental error that, prior to the submission of the examiner's report, it be made available to the parties.
>
> * * *
>
> The Board did not hear the evidence, nor review the record. It was thus incumbent that the findings be submitted to the adverse party and that briefs be filed and oral arguments held.

> It was not error for the Board to appoint a hearing examiner to receive and hear evidence concerning the complaint. It was error, however, for the Board to reach a decision and adopt the findings of fact and conclusions of law of the hearing examiner without affording notice and an opportunity of hearing to the appellants. This is an elementary fundamental right of procedural due process in any proceeding which is to be accorded finality. . . ." *Id.* at 102.

In *Matter of University of Kansas Faculty: Coggins* v. *Public Employees Relations Board,* 581 P.2d 817 (Kan. Ct. App. 1978), the board rejected the recommendations of a hearing officer. The board members "were not conversant with the record to the extent required of an informed decision." *Id.* at 823. Citing *Morgan,* the court held:

> "If the deciding authority makes its decision based on a hearing officer's report, due process requires that the parties be served with copies and be allowed to take exceptions thereto." *Id.*

Other state court decisions which support the principles set forth in this brief are: *Kilgus* v. *Board of Estimate,* 127 N.E.2d 705 (N.Y. 1955); *White* v. *Board of Education,* 501 P.2d 358 (Hawaii 1972); *Tulsa Classroom Teachers Association, Inc.* v. *State Board of Equalization,* 601 P.2d 99 (Okla. 1979); *Citizens Bank* v. *First State Bank,* 580 S.W. 2d 344 (Tex. 1979); *Younkin* v. *Boltz,* 216 A.2d 714 (Md. 1966); *Joyce* v. *Bruckman,* 15 N.Y.S. 2d 679 (App. Div. 1939); *Allied Compensation Insurance Co.* v. *Industrial Accident Commission,* 367 P.2d 409 (Cal. 1961); *Falke* v. *Industrial Commission,* 116 N.W.2d 125 (Wis. 1962); *State* v. *Wrabetz,* 285 N.W. 504 (Wis. 1939); *Amerada Petroleum Corp.* v. *Hester,* 109 P.2d 820 (Okla. 1940); *Redcay* v. *State Board of Education,* 25 A.2d 632 (N.J. 1942); and *Winston* v. *Board of Education,* 309 A.2d 89 (N.J. Super. Ct. 1973), *aff'd,* 319 A.2d 226 (N.J. 1974).

VII. THE DISTRICT COURT ERRED IN FAILING TO FIND THAT JONES WAS DENIED A FAIR HEARING BY THE FINAL DECISION MAKER, BOARD OF EDUCATION.

A. The district court erred in ruling that there was a constitutionally sufficient review of the evidence.

The district court relied on cases which held that *Morgan I* does not necessarily require that the final decision maker review all the evidence, but only that there be a sufficient basis for the agency to acquire a personal understanding of the evidence.[6] The court then went astray by holding that "[t]he referee's report included a detailed and specific review of the evidence." (App. 14a). In fact, in the 4¼ page discussion of evidence, the referee made no real attempt to summarize the 1605 pages of testimony and 90 exhibits. The referee did not outline the opposing positions of the parties. The report's failure to recite plaintiff's version of the evidence coupled with the plaintiff's inability to communicate his arguments to the board created a fatal flaw in the proceedings. The multiple defects (lack of summary of evidence, no objections permitted, no notice, no oral hearing, no transcript available, *ex parte* participation of counsel) were not present in the cases cited by the district court.

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[6] *Bates* v. *Sponberg*, 547 F.2d 325 (6th Cir. 1976), relied on by the court, is in error if it is read to hold that a referee's summary of evidence in support of the administration's charges is sufficient in lieu of a summary of *all* the evidence, pro and con.

B. The district court erred in ruling that any defect in the procedures before the final decision maker was cured by the prior opportunity of an evidentiary hearing before the referee and by the possibility of judicial review of board action.

The district court noted many procedural safeguards provided by the Ohio statute, in particular plaintiff's right to an evidentiary hearing before an impartial referee.[7] However, it is the board of education, not the referee, which makes the final decision concerning termination. The legislature intended that the board make a *de novo* decision applying its own policies and expertise. As stated by this Court in *Hortonville Joint School District No. 1* v. *Hortonville Educational Association*, 426 U.S. 482, 495-96 (1976):

> "State law vests the governmental, or policymaking, function exclusively in the School Board . . . the state legislature has given to the Board the power to employ and dismiss teachers . . . permitting the Board to make the decision at issue here preserves its control over school district affairs . . . and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law."

That plaintiff received due process at the referee hearing was no guarantee of a fair and reasoned judgment at the board level.

Similarly, the prospect of correction of error by judicial review in the court of Ohio does not render constitutional

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[7] The court's reliance on *Whitsel* v. *Southeast Local School District*, 484 F.2d 1222 (6th Cir. 1973), was misplaced since none of the issues at bar were present.

what is unconstitutional. As stated in *Fuentes* v. *Shevin,* 407 U.S. 67, 81 (1972):

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."

Further:

> "This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone." *Stanley* v. *Illinois,* 405 U.S. 645, 647 (1972).

It is unreasonable to require Jones and other teachers who are out of work and without funds, to retain and pay a lawyer to file a lawsuit in court, which may extend over several years, to vindicate rights which were violated in the administrative process. In *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972), plaintiff was denied a fair hearing in a mayor's court concerning traffic offenses. The Court held:

> "Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial *de novo* in the County Court of Common Pleas. We disagree. This 'procedural safeguard' does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." *Id.* at 61-62 (footnote omitted).

The district court ignored *Ward* and other examples of the doctrine that *de novo* review by a state court is not

a cure for constitutional error in administrative proceedings, *e.g., Gibson* v. *Berryhill,* 411 U.S. 564, 577 (1973); *Armstrong* v. *Manzo,* 380 U.S. 545 (1965); *Katris* v. *City of Waukegan,* 498 F. Supp. 48 (N.D. Ill. 1980); and *Pregent* v. *New Hampshire Dept. of Employment Security,* 361 F. Supp. 782 (D.N.H. 1973), *vacated on other grounds,* 417 U.S. 903 (1974).

C. The district court erred in misapplying the Mathews doctrine.

The case of *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), stated the test to be applied in determining whether there has been due process:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

The district court erred in its application of *Mathews.* First of all, no one can question the importance of the plaintiff's contract rights and professional reputation which are the "private interests" at stake. Second, as previously demonstrated, there is a high risk of erroneous administrative action when the referee is not required to summarize *all* the evidence, pro and con, and when there is no other way for the board to obtain a substantial understanding of the record. The suggested safeguards add great value. As stated by this Court in the *Fuentes* case:

> "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantially unfair and simple mistaken deprivations of property interests can be prevented." 407 U.S. at 81.

If plaintiff were able to point out substantial errors made by the referee, the board would be reluctant to accept the referee's recommendations. Furthermore, the party who loses at the referee hearing, may win at the board level if given the opportunity to make policy arguments directed at the board's special expertise, not possessed by the referee.

A further value is the appearance of fairness fostered by the right to have one's arguments heard by the decision maker. As stated by this Court in *Carey* v. *Piphus*, 435 U.S. 247, 262 (1978):

> "[A] purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests."

There is no governmental interest, or financial or administrative burden, to justify denying the plaintiff the right to file objections to the referee's report. At most, the board would be required to read memoranda and to listen to oral argument. The governmental burden is insignificant compared to the devastating impact of plaintiff's contract termination and compared to the therapeutic and public benefits of the appearance of a fair hearing.

CONCLUSION

The foregoing considered, this Court should note probable jurisdiction because of the potentially broad impact of the district court's decision upon administrative procedure. The doctrines of *Morgan, Ward* and *Mathews* have stood as bulwarks preserving the rights of individual citizens and corporations to due process before regulatory bodies and administrative agencies. Unless this Court speaks out, there will be a dilution of time-honored concepts of fundamental fairness and a danger of return to abuse and excess by administrative agencies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of Appellant's Jurisdictional Statement were served by deposit in a U.S. post office box for first class mail, with postage prepaid, upon counsel for all of the parties required to be served: Philip Olinger, Esq., 115 Fieldstone Dr., Terrace Park, Ohio 45174, on the 23rd day of December 1981 in accordance with the provisions of Rule 28.

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Paul H. Tobias

Appendix

81-1356

NO. ———

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

———

CLIFFORD JONES,

Appellant,

vs.

WILLIAM M. MORRIS, ET AL.,

Appellees.

———

On Appeal from the United States District Court for the Southern District of Ohio, Western Division

———

AMENDED APPENDIX TO JURISDICTIONAL STATEMENT

———

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EXPLANATORY NOTE

The original appendix was rejected by the clerk's office because its type size did not conform to the requirements of Rule 33 of the Supreme Court Rules. This amended appendix contains only those documents required by the rules. Because of lack of funds, Appellant was unable to duplicate in this amended appendix all of the documents set forth in the original appendix. However, the Clerk's Office does have copies of the original appendix which can be consulted to verify the citations contained in the Jurisdictional Statement.

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DISTRICT COURT OPINION AND ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CLIFFORD JONES, Plaintiff, vs. WILLIAM M. MORRIS, et al., Defendants.	NO.: 8785 **OPINION AND ORDER** Filed August 28, 1981

JONES, J.; SPIEGEL, J.; RICE, J.:

The instant action, arising under 42 U.S.C. § 1983, involves a question of procedural due process by challenging the constitutionality of Ohio Rev. Code § 3319.16. This statute provides the procedure to be followed when the dismissal of a tenured teacher for cause is sought, as interpreted by the courts of the State of Ohio. The suit was brought by a tenured public school teacher who was discharged under the procedures outlined in that statute. This teacher, Mr. Clifford Jones, alleges that the Mt. Healthy School Board (the Board), terminated his employment without a proper hearing as required by the due process clause of the Fourteenth Amendment of the Constitution, and seeks to avoid the operation of Ohio Rev. Code § 3319.16 on that basis.

Since Mr. Jones is seeking an injunction against the enforcement of a state statute on the grounds of unconstitutionality, a three-judge panel was convened pursuant to 28 U.S.C. § 2281 to consider the case. Although that statute was repealed in 1976, the repeal is not effective as to actions, such as this one, which were pending on that date.

Mr. Jones taught in the Mt. Healthy City School District from 1955 until 1973. In April of the latter year, the Board

notified him that it was considering terminating his employment with the School District, and that, pending final hearing on the matter, he would be placed under immediate suspension. In response, Jones filed the instant action (doc. 1).

The facts surrounding Jones' termination by the School Board were stipulated by the parties. On April 5, 1973, the Board sent Jones a letter advising him of the Board's intention to consider the termination of his current continuing teaching contract on eight different grounds, each of which was numbered and specifically stated. Five days later, Jones, through his counsel, wrote the Board a letter in which he elected to have a hearing before a referee instead of the Board, which was his statutory option. The hearing, at which Mr. Jones was represented by counsel, included the testimony of twenty witnesses and lasted for eight days. One week after the termination of the hearing, Jones and the Board received the referee's report. This report made specific findings of fact and conclusions regarding the written charges against Jones. The report consisted of six pages detailing specific incidents which the referee felt supported the charges numbered one, two, three and six. The report also indicated that, in the referee's opinion, there was insufficient evidence to support charge eight and that charges four, five, and seven were insubstantial. The referee decided that the actions specified in charges one, two, three and six existed in such degree and continued over such a period of time as to amount to insubordination and constituted good and just cause for Jones' termination. Accordingly, he recommended to the Board that Jones be terminated.

Two days after receipt of the referee's report, the Board met at its regularly scheduled meeting. Neither Jones nor his counsel were notified of this meeting, nor were they in attendance. At that meeting, legal counsel reported on the findings and recommendations of the referee regarding Jones' continuing contract. The minutes of that meeting reflect that after some discussion and consideration, the Board, four of

its five members in attendance, voted to accept the report of the referee and also voted to terminate the continuing teaching contract of the plaintiff on the grounds set forth in the report.

Jones' attorney did write the Board to request a hearing before the Board with respect to the referee's report. He also asked that they be notified in advance of any proceeding of the Board concerning Mr. Jones' proposed termination and that Mr. Jones be furnished with a copy of the record of the proceedings before the referee. The Board received this letter the day after their meeting. It advised Jones in a letter dated June 27, that the Board had voted to terminate his contract after considering the referee's report, and that he had thirty days to file a notice of appeal with the Court of Common Pleas of Hamilton County, Ohio. The Board also noted that it would consider the requests stated in Jones' letter at their next, regularly scheduled meeting.

Jones' attorney did appear at this next meeting and asked that he be allowed to be heard at a special meeting of the Board at a future date and that the Board read the transcript of the referee when it became available. On August 9, 1973, the Board notified Jones' attorney that Ohio Rev. Code § 3319.16, in their opinion, did not require such a hearing, and, on that basis, denied his request. The transcript of the hearing, which totalled 1605 pages and included 90 exhibits, was not delivered to the Board until November 28, 1973.

On July 6, 1973, counsel for Jones moved to amend his existing federal complaint by adding Count V (doc. 15) to reflect his employment termination and to further allege that the denial of an opportunity to be heard before the Board itself violated the requirements of procedural due process. He also appealed the Board's decision to the Hamilton County Court of Common Pleas pursuant to Ohio Rev. Code § 3319.16. The District Court, noting that plaintiff had raised the issue of the proper interpretation of Ohio Rev. Code § 3319.16 in the state court proceedings, and noting further that the state

courts of Ohio had never had an opportunity to rule on this statute, stayed all proceedings, including Jones' motion to amend, pending the finality of the state court proceedings instituted by Jones (doc. 24).

Jones pressed his constitutional claims as far as he could within the state court system. The trial court, on Jones' motion for summary judgment, determined that the Board was the "final decision maker" and that due process mandated that Jones receive some kind of hearing before the Board. *Jones* v. *Board of Education*, No. A-735247 (C.P. Ham. County 1977). The Court believed that at a minimum Jones was entitled to file objections to the referee's report and to appear and argue such objections orally before the Board. *Id.*, slip op. at 7.

On appeal, the Court of Appeals for the First Appellate District of Ohio reversed, holding that the plain language of the statute contemplated two distinct and mutually exclusive avenues for the resolution of disputes concerning termination of a teacher's employment, and that Jones' election of one of those avenues, a hearing before a referee, constituted a waiver of the other, a hearing before the Board. *Jones* v. *Board of Education*, 60 Ohio App. 2d 138 (Ct. App. Ham. County 1978) 14 Ohio Ops. 3d 108. Having decided that, the Court of Appeals went on to hold that the statute, so construed, did not violate Jones' constitutional right to due process of law. The Court found the decision of *Whitsel* v. *Southeast Local School District*, 484 F.2d 1222 (6th Cir. 1973) to be dispositive of Jones' claims. Accordingly, the Ohio Court of Appeals reversed the judgment of the trial court, and remanded the case for a determination in the common pleas court of the sufficiency of the evidence and whether such evidence constituted sufficient cause for termination. Jones appealed and the Supreme Court of Ohio dismissed that appeal on the ground that no substantial constitutional question existed. *Jones* v. *Board of Education*, No. 78-1322 (S.Ct. Ohio 1978). Thus, Jones' constitutional claims were finally determined by the state courts.

Having obtained the authoritative state court construction for which this Court abstained, Jones returned to the District Court for a final determination of his claim despite the fact that Jones' appeal to the common pleas court has never been finally decided. The District Court, in an order dated March 11, 1980, granted Jones' motion for leave to amend his complaint and his motion to convene a three-judge district court, which is the panel presently constituted, pursuant to 28 U.S.C. § 2284 (doc. 59). In granting such motion, the District Court was of the opinion that the state court's construction of Ohio Rev. Code § 3319.16 left open constitutional issues which were fairly subject to debate.

This case came before the panel for oral argument on May 28, 1981 on cross motions for summary judgment filed by the parties (docs. 49 and 50), plaintiff's amended complaint and defendant's answer (docs. 44 and 47), memoranda in opposition to the motions for summary judgment (docs. 52 and 55), defendant's reply memorandum (doc. 57), and the stipulation of facts with accompanying exhibits (doc. 56). In addition, subsequent to oral argument, an *amicus curiae* brief was filed by the Ohio Educational Association on Jones' behalf (doc. 83). The only issue before the panel at this time, all other issues raised by the parties in connection with this action having been previously disposed of, is whether Ohio Rev. Code § 3319.16, as interpreted by the Ohio courts, affords a teacher a meaningful hearing, in the context of Fourteenth Amendment due process, if there is no provision for the teacher to interpose his objections to the referee's report and recommendation to the Board before it rules on the report of the referee concerning the termination of the teacher's contract.

The Supreme Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in

a meaningful manner.'" *Mathews,* at 333; *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965).

Due process, unlike some legal rules, is not a rigid concept with a fixed content unrelated to time, place, and circumstances; rather, it is flexible and calls for such procedural protections as the particular situation demands. *Mathews* v. *Eldridge, supra.* Accordingly, the *Mathews* court used the traditional balancing test to determine whether the procedures involved in the termination of social security disability benefits were constitutionally sufficient. They stated:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

The *Mathews* criteria have been held applicable to determine the sufficiency of procedures in cases where a property interest is in danger of being terminated by the state. *Frumkin* v. *Board of Trustees, Kent State University,* 626 F.2d 19 (6th Cir. 1980).

Under Ohio Rev. Code § 3319.16, tenured teachers, such as plaintiff, have an interest in their continued employment and cannot be terminated except for "gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause." Ohio Rev. Code § 3319.16. Such an interest is a property interest protected by the Fifth and Fourteenth Amendments to the United States Constitution. It cannot be terminated without affording a teacher certain procedural due process rights which dictate, that at the very minimum, he be accorded notice of the grounds for his termination and

a hearing at which he is given the opportunity to challenge the sufficiency of those grounds. *Perry* v. *Sindermann*, 408 U.S. 593, 603 (1972).

Ohio Rev. Code § 3319.16 provides specific procedures to be followed in a proceeding to terminate a tenured teacher's contract. The statute entitles a teacher to written notice of the charges against him and of the date and time of the evidentiary hearing. The hearing may be had before the Board or before a referee. In either case, the teacher is entitled by statute to be represented by counsel, to call witnesses on his behalf, and to confront and cross-examine witnesses against him. The evidence is to be limited to the charges, and a stenographic record is to be made of the entire proceedings, a transcript to be furnished to the teacher. If the hearing is before a referee, the referee must file his report within ten days after the date the hearing terminates. The board must consider the referee's report, after which it may accept or reject the referee's recommendation on the termination of the teacher's contract. Any order of termination must state the grounds therefor. The statute further provides that any teacher affected by an order of termination may appeal the determination to the court of common pleas of the county in which the school is located, which shall be an original action in such court. The court shall examine the transcript and record of the hearing, shall hold such additional hearings as it deems advisable and may consider other evidence in addition to the transcript and record. The procedure just described was followed in the instant case, with the hearing being held at plaintiff's request before a referee. The Sixth Circuit has determined that this statute provides all the procedural process that is due. *Whitsel* v. *Southeast Local School District*, 484 F.2d 1222 (6th Cir. 1973).

In *Whitsel*, a tenured teacher was given a hearing before the school board which, pursuant to Ohio Rev. Code § 3319.16, terminated his contract. He filed an action in federal court pursuant to 42 U.S.C. § 1983 alleging, *inter alia*, that

he had been denied due process of law because the board was not an impartial decisionmaker. The court upheld the constitutionality of the statute on the basis that, had he felt the board was biased, the teacher had the statutory option to demand a hearing before an impartial referee. The court went on to state:

> The pertinent Ohio statute specifies the grounds for termination of a continuing contract, requires written notice and time to prepare a defense, and provides the option of requesting a referee to conduct the hearing instead of the school board, a stenographic record, the right of confrontation, the right to counsel, and the right to subpoena witnesses. It also provides for plenary review of an order of termination in the state courts. Tested by every standard ever enunciated, these rights constitute procedural due process in a contract termination proceeding. *Id.* at 1229.

The court also noted that Ohio Rev. Code § 3319.16 gave the teacher a forum in the court of common pleas in which to litigate the question of whether the conduct complained of constitutes sufficient cause for dismissal and the issues concerning the commitment of infractions of rules and the propriety of any sanction.

The scope of review of the common pleas court under § 3319.16 was determined in *Hale* v. *Board of Education*, 13 Ohio St. 2d 92, 234 N.E. 2d 583 (1968). The common pleas court has the authority to weigh the evidence on an appeal from an order of the board terminating a teacher's contract, and, although it may not consider the matter *de novo*, if it does not find that the board's order is supported by reliable, probative, and substantial evidence and is in accordance with law, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative and substantial evidence and is in accordance with law. *Cf. University of Cincinnati* v. *Conrad*, 63 Ohio St. 2d 107, 407 N.E.2d 1265 (1980).

Plaintiff argues that despite all of these procedural precautions, Ohio Rev. Code § 3319.16 is unconstitutional if, in the case where a teacher chooses to have a hearing before an impartial referee, it does not accord him his alleged due process rights to have the board make its decision on all of the evidence, as opposed to solely on the basis of the referee's report, and to have the right to appear in person before the board and state his objections to the referee's report. Plaintiff relies heavily on *Morgan* v. *United States*, 298 U.S. 468 (1936) (*Morgan* I) and *Kinsella* v. *Board of Education*, 378 F. Supp. 54 (W.D.N.Y. 1973) for the former allegation and *Goldberg* v. *Kelly*, 397 U.S. 259 (1970) for the latter.

Morgan I dealt with an order of the Secretary of Agriculture which established maximum rates to be charged by market agencies at the Kansas City stockyards. The agencies challenged the order on the basis that the Secretary had neither heard nor read the evidence presented in connection with the administrative proceedings; nor had he heard or considered oral arguments on briefs submitted by the agencies regarding the evidence taken. The applicable statute required a full hearing, and the market agencies contended that this had been denied them by the Secretary's failure to consider the evidence.

The Supreme Court noted that if the Assistant Secretary to whom the duty of holding the hearing had been assigned had received the evidence taken by the examiner, had heard argument thereon, and had then found the essential facts and made the order upon his findings (in fact, what was performed by the referee in the case under consideration), the issue would simply be one of delegation. But, for a constitutionally sufficient due process hearing to be accorded, one official may not examine the evidence while another official, who has heard neither evidence nor argument, makes the findings and order. Yet, this language does not require the ultimate authority to hear all the evidence.

Morgan I has consistently been interpreted to allow the decisionmaker to base his decision on the reports, findings, or

summaries of those delegated to hear the evidence. *Yaretsky* v. *Blum*, 629 F.2d 817, at 823 (2d Cir. (1980); *Seacoast Anti-Pollution League* v. *Costle*, 572 F.2d 872, at 880, 881 (1st Cir. 1978); *Bates* v. *Sponberg*, 547 F.2d 325, at 331 (6th Cir. 1976); *Montrose Chemical Corp.* v. *Train*, 491 F.2d 63, at 69 (D.C. Cir. 1974); *National Nutritutional Foods Association* v. *F.D.A.*, 491 F.2d 1141, at 1144, 1145 (2d Cir. 1974); *Braniff Airways, Inc.* v. *C.A.B.*, 379 F.2d 453, at 460 (D.C. Cir. 1967); *Utica Mutual Insurance Company* v. *Vincent*, 375 F.2d 129, at 131, 132 (2d Cir. 1967); 2 Davis Administrative Law § 11.03 (1958). With the exception of *Utica Mutual*, *Yaretsky*, and *Bates*, the holdings in the above cases were based on an interpretation of the requirements of the Administrative Procedure Act under the rules of administrative law. Only *Utica Mutual*, *Yaretsky*, and *Bates* addressed the issue of constitutional due process directly.

In *Utica Mutual*, Judge Friendly stated that the due process clause of the Fifth Amendment, even when it required a "trial type" hearing, did not require that sensible rules of judicial administration be frozen into a constitutional imperative which would require that the decider actually hear the evidence or be furnished a report on the credibility of witnesses. *Utica Mutual*, 375 F.2d at 131, 132. Relying on Mr. Justice Robert's statement in *N.L.R.B.* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 350-361 (1938) that "the Fifth Amendment guarantees no particular form of procedure; it protects substantial rights," Judge Friendly recognized that the due process clause does not require, under all circumstances, that factual determinations be made by the person hearing the evidence. *Id.* at 132.

Yaretsky v. *Blum*, dealt with due process requirements in a transfer of a Medicaid patient from a lower level of care to a higher one. The Court found that due process required timely notice and a hearing, but the court squarely held that the Fourteenth Amendment to the United States Constitution did not require a decisionmaker to read the hearing transcript prior to issuing a final administrative order. In

Yaretsky, the court found that patients about to be transferred had a statutory right to a fair hearing provided by the state. The hearing is conducted by a hearing examiner who listens to the testimony, prepares a summary, and makes a recommendation to the Commissioner. The fact that the Commissioner's decision was based on the hearing officer's summary of facts was held to be sufficient. The Court suggested that the chief purpose of a state statutory requirement that a transcript be made was to allow judicial review.

Bates v. *Sponberg*, 547 F.2d 325 (6th Cir. 1976) involved the dismissal of a tenured faculty member from Eastern Michigan University. The plaintiff was accorded a hearing before the Faculty Senate Grievance Committee, pursuant to the school's procedures governing dismissal for cause of tenured faculty members as set forth in the school's Faculty Handbook and adopted by the Board of Regents. A transcript of the proceedings was made, and the Grievance Committee prepared a report which the District Court found to have succinctly stated the relevant findings of fact. The committee concluded that adequate cause for dismissal was present, but recommended against outright discharge.

The professor requested a hearing before the Board of Regents and specifically asked that President Sponberg transmit to the board the record in his case, including the transcript of the hearing and all evidence taken by the committee as well as summaries prepared by himself and the administration. Bates also asked for a hearing before the Board for the purpose of presenting oral and written arguments.

President Sponberg did not transmit the record as requested by Bates and as required by the dismissal procedures in the Faculty Handbook. All that the Board received was the report and recommendation of the grievance committee, a further report and recommendation of dismissal by President Sponberg, and Bates' letter requesting a hearing and transmittal of the record. The Board of Regents denied Bates'

request for a hearing and approved Sponberg's report that Bates be dismissed.

The Sixth Circuit, recognized that the sole issue present was whether the circumstances presented violated Bates' right to due process under the Fourteenth Amendment to the United States Constitution, held that no constitutional violation had been shown. The court noted that although courts did generally invalidate adjudicatory actions by federal agencies which violated their own regulations promulgated to give a party a procedural safeguard, the basis for such reversals was not the Due Process Clause but rather a rule of administrative law. *Bates*, 547 F.2d at 330, fn. 7. The court held that the mere departure from university regulations, standing alone, did not deprive Bates of any constitutional right.

The Court further held that, measured by the standards of *Morgan* I, the Board of Regents' consideration of and action upon the report of the grievance committee met the minimal requirements of due process, since the reports by the committee and by President Sponberg provided a sufficient basis for the Board to acquire a personal understanding of the evidence supporting the charges against Bates. The Court reasoned as follows:

> *We think the crux of the issue*, in terms of due process under the Fourteenth Amendment, *is not whether the due process hearing to which Professor Bates may have been entitled was held in the presence of the authority having final responsibility to determine his discharge, but instead whether the hearing accorded him was meaningful.* We believe this question must be measured in terms of the issue to be decided, who is ultimately to decide it, and the manner by which the hearing is employed in the decisional process, in light of the realities of efficient administration in modern government. (emphasis added).

The *Bates* Court also distinguished *Morgan* I on the ground

that that decision was based on statutory and not constitutional grounds. *Id.* at 331.

Thus, under *Morgan* I, *Utica Mutual*, *Yaretsky*, and *Bates* there is no requirement, constitutional or otherwise, that a decisionmaker in an administrative adjudication consider the actual evidence produced in a hearing before a hearing officer before making its final decision. A constitutionally sufficient review of the evidence entails consideration of a report, summary, or findings and recommendations prepared by the hearing officer. Clearly the board, in the instant case, violated no constitutionally mandated precepts in basing its decision to terminate Jones on the basis of the referee's report and recommendation. The referee's report included a detailed and specific review of the evidence pertaining to the charges against Jones as well as the referee's conclusions that the evidence was sufficient to show good and just cause for Jones' termination, which he recommended.

Kinsella v. *Board of Education*, 378 F. Supp. 54 (W.D. N.Y. 1973) *aff'd without opinion* 542 F.2d 1165 (*Kinsella* I) also relied on by Jones, is inapposite. The *Kinsella* Court considered a New York state statute which it found did not require the decision of the Board of Education to be based exclusively on evidence produced before the hearing panel. *Kinsella* v. *Board of Education*, 402 F. Supp. 1155 at 1156 (W.D.N.Y. 1975) (*Kinsella* II). Neither this holding nor its rationale consider *Morgan* I or any of its progeny. The statute had also been construed to mean that the hearing panel's recommendations were merely advisory and in no way conclusory or the employing board. None of these conditions are present in the instant case. Ohio Rev. Code § 3319.-16 explicitly states that if the hearing is before the referee, the board may vote to accept or reject the referee's recommendation after consideration of the referee's report, which shall be based only on evidence concerning the charges against the teacher, and that any order of termination should state the grounds therefor.

Plaintiff next argues on the basis of *Goldberg* v. *Kelly*, 397

U.S. 259 (1970) that he has a constitutional right to appear before the board in person and present his arguments.

The primary issue in *Goldberg* was whether due process required an evidentiary hearing prior to the termination of welfare benefits. The Court held that under the circumstances, where a person could be deprived of his only means of support, due process did require a pre-termination hearing which need not take the form of a judicial or quasi-judicial trial. Such a hearing could be constitutionally limited to the minimum procedural safeguards, adopted to the particular characteristics of welfare recipients.

The court started from the "fundamental requisite of due process" which is the opportunity to be heard at a meaningful time and in a meaningful manner. *Goldberg*, 397 U.S. at 267. In the unique context of termination of welfare benefits, these principles were held to require timely and adequate notice detailing the reasons for the proposed termination and an effective opportunity to defend by confronting adverse witnesses and by presenting arguments and evidence in person. The court found that the existing procedures, which did not permit welfare recipients to appear personally with or without counsel before the official who finally determined continued eligibility, or to present evidence orally to that official or to confront or cross-examine witnesses, were constitutionally inadequate. However, the personal appearance before the decisionmaker in *Goldberg* was constitutionally required under the premise that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg*, 397 U.S. at 268-269.

Thus, as noted by the Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 345 (1975), where the court held that discontinuance of disability benefits was not a context in which due process required a prior hearing because the potential value of an evidentiary hearing or even oral presentation to the decisionmaker was substantially less than in *Goldberg*:

> The decision in *Goldberg* also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to write effectively" and could not afford professional assistance.

Mathews, 424 U.S. at 345.

In making its decision that a hearing was not required prior to discontinuance or termination of disability benefits, the *Mathews* court set up the criteria for the determination of the parameters of due process in a given circumstance. *Cf. Frumkin* v. *Board of Trustees, Kent State University*, 626 F.2d 19 (6th Cir. 1980). However, the *Mathews* court even cautioned against the application of these criteria:

> But more is implicated in cases of this type than *ad hoc* weighing of fiscal and administrative burdens against the particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of the courts. . . ." The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. *The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and an opportunity to meet it. . . ." All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard, . . ."*

> *to insure that they are given a meaningful opportunity to present their case.* [citations omitted] [emphasis added]

Mathews, 424 U.S. at 348, 349.

In the instant case, of course, Jones had the opportunity to appear personally with counsel for a full, trial-type evidentiary hearing either before the Board, the final decisionmaker, or a neutral hearing officer, prior to the termination of his employment. Jones appeared before the referee by his own choice. The case law is clear that such a hearing officer may report to the final decisionmaker on the evidence received, and the decisionmaker may base his decision on the referee's report. The additional procedural safeguard which Jones asserts he is due is an opportunity to make an oral or written objection to the hearing officer's decision; in essence, a proce' similar to that of a judicial appeal from the decision ..e trial court as to findings of fact.

The only case directly on point as to the constitutional requirement of such a procedure is *Bates* v. *Sponberg*, 547 F.2d 325 (6th Cir. 1976), in which the Sixth Circuit held that the Due Process Clause of the United States Constitution was not violated when a teacher who faced termination of his contract for cause was not permitted to object, either in writing or orally, before the final decisionmaker. Interestingly, Professor Kenneth Culp Davis emphatically supports the position that due process does not require the opportunity to present oral argument in an administrative proceeding. Davis, *Administrative Law Treatise*, 2d ed. Vol. 2 (1979).

There is language in *Morgan* I, *Morgan* II, and some of the cases decided under the Administrative Procedure Act following them which suggest that oral or written argument should be allowed and considered by the decisionmaker where the matter was heard by a hearing examiner. However, as noted in *Bates* v. *Sponberg*, 547 F.2d 325, these cases deal with rules of administrative, not constitutional law. What

may be required by administrative law or rules of accepted judicial administration is not constitutionally required. *Bates* v. *Sponberg, Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129 (2d Cir. 1967); *Mathews* v. *Eldridge*, 424 U.S. 319 (1975); *Yaretsky* v. *Blum*, 629 F.2d 814 (2d Cir. 1980).

What is required, under the criteria of *Mathews* v. *Eldridge*, are procedures that will insure fairness in administrative action. *Id.* 424 U.S. at 348. Using the criteria of *Mathews* we conclude that the present procedures are fair, and the additional procedures demanded by Jones are unnecessary to insure minimal constitutional due process.

Jones' interest in his teaching job is a constitutionally protected property interest which will be affected by the board's action. The board, in turn, has an interest in insuring quality education through the use of qualified and responsible teachers for the students in its school district. A corollary to that interest is the ability to discharge efficiently those teachers who for good reason are not competent or willing to promote the Board's educational goals. The numerous procedural safeguards with which a public school teacher facing termination has been provided in a termination proceeding under Ohio Rev. Code § 3319.16 have already been detailed. All of the procedures in the statute, including the provision for plenary review by a common pleas court, ensure that there will be small margin for unfairness which will minimize chances for error in a termination proceeding. Clearly, a common pleas court is a more competent forum for a review of the sufficiency of the evidence than a school board. The board's decision, that the referee's findings constitute sufficient cause to terminate a teacher, is an act within their particular expertise, which, however, is also subject to review if not supported or warranted by the evidence adduced at the hearing. *See* for example, *Hale* v. *Board of Education*, 13 Ohio St.2d 92, 234 N.E. 2d 583 (1968). Thus, it is doubtful if Jones' proposed procedural safeguard of interposing his objections between the referee's findings of fact and the board's ultimate decision on the "legal" consequences of that act

would be of great value in lessening the already minimal risk of an unfair termination.

Jones, in fact, was accorded a procedure by § 3319.16 which allowed him to choose an impartial decisionmaker in the form of a referee. This option was the essential procedure upon which the *Whitsel* court determined that § 3319.-16 was constitutional. Such procedures as those set forth in § 3319.16, which assure a right to a full and unbiased evidentiary hearing as well as subsequent judicial review before a termination decision becomes final, are considered sufficient to assure fair consideration of a litigant's claims. *Mathews* v. *Eldridge*, 424 U.S. at 348. *Cf. Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Bates* v. *Sponberg*, 547 F.2d 325 (6th Cir. (1976).

The additional procedural safeguards requested by Jones would be of little, if any, value in minimizing any risk of an unfair deprivation of Jones' property interest in his continuing teaching contract. In fact, under similar factual situations, courts have held that such procedures are not constitutionally required. *Perry* v. *Sindermann; Bates* v. *Sponberg*.

Accordingly, this Court finds that Ohio Rev. Code § 3319.-16 is constitutional in that the procedures it details provide a teacher faced with a termination proceeding sufficient due process to ensure the teacher a meaningful hearing. Jones' prayer for relief is DENIED.

SO ORDERED.

/s/ S. ARTHUR SPIEGEL

United States District Judge
For the Panel

DISTRICT COURT JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CLIFFORD JONES, Plaintiff, vs. WILLIAM M. MORRIS, et al., Defendants.	Civil Action File No. 8875 **JUDGMENT** Filed August 28, 1981

This action came on for hearing before the Court, Honorable Nathaniel R. Jones, United States Court of Appeals Judge, S. Arthur Spiegel and Walter H. Rice, United States District Judges, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that this Court finds that Ohio Rev. Code Section 3319.16 is constitutional in that the procedures it details provide a teacher faced with a termination proceeding sufficient due process to ensure the teacher a meaningful hearing. Jones' prayer for relief is DENIED.

Dated at Cincinnati, Ohio, this 28th day of August, 1981.

JOHN D. LYTER
Clerk of Court

/s/ Paul Schulz III
Deputy Clerk

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CLIFFORD JONES, Plaintiff, vs. WILLIAM M. MORRIS, et al., Defendants.	CASE NO. 8785 NOTICE OF APPEAL Filed October 26, 1981

Notice is hereby given that Clifford Jones, Plaintiff above named, hereby appeals to the United States Supreme Court from the final judgment entered in this action on August 28, 1981. This appeal is taken pursuant to 28 U.S.C. § 1253 (1976).

Pursuant to 28 U.S.C. § 2403(b) (1976), the above named district court notified the Ohio attorney general that the constitutionality of Ohio Rev. Code § 3319.16 was being challenged in this case, and the Ohio attorney general, through his letter to Judge Spiegel dated April 20, 1981, informed the court of his intention not to participate in the district court proceedings.

/s/ Paul H. Tobias

TOBIAS & KRAUS
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Cincinnati, Ohio 45202
(513) 241-8137

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing was mailed to Philip Olinger, Attorney for Defendant, and to the Attorney General of the State of Ohio, this 26th day of October, 1981.

/s/ Paul H. Tobias

STIPULATED OHIO REVISED CODE § 3319.16

3319.16 Termination of contract by board of education

The contract of a teacher may not be terminated except for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause. Before terminating any contract, the employing board shall furnish the teacher a written notice signed by its clerk of its intention to consider the termination of his contract with full specification of the grounds for such consideration. Such board shall not proceed with formal action to terminate the contract until after the tenth day after receipt of such notice by the teacher. Within ten days after receipt of such notice from the clerk of the board, the teacher may file with the clerk a written demand for a hearing before the board or before a referee, and the board shall set a time for the hearing which shall be within thirty days from the date of receipt of the written demand, and the clerk shall give the teacher at least twenty days' notice in writing of the time and place of such hearing. If a referee is demanded by either the teacher or board, the clerk shall also give twenty days' notice to the superintendent of public instruction. No hearing shall be held during the summer vacation without the teacher's consent. Such hearing shall be private unless the teacher requests a public hearing. The hearing shall be conducted by a referee appointed pursuant to section 3319.161 of the Revised Code, if demanded; otherwise, it shall be conducted by a majority of the members of the board and shall be confined to the grounds given for such termination. The board shall provide for a complete stenographic record of the proceedings, a copy of such record to be furnished to the teacher. The board may suspend a teacher pending final action to terminate his contract if, in its judgment, the character of the charges warrants such action.

Both parties may be present at such hearing, be represented by counsel, require witnesses to be under oath, cross-examine

witnesses, take a record of the proceedings, and require the presence of witnesses in their behalf upon subpoena to be issued by the clerk of the board. In case of the failure of any person to comply with a subpoena, a common pleas judge of the county in which the person resides, upon application of any interested party, shall compel attendance of the person by attachment proceedings as for contempt. Any member of the board or the referee may administer oaths to witnesses. After a hearing by a referee, the referee shall file his report within ten days after the termination of the hearing. After consideration of the referee's report, the board by a majority vote may accept or reject the referee's recommendation on the termination of the teacher's contract. After a hearing by the board, the board by a majority vote may enter its determination upon its minutes. Any order of termination of a contract shall state the grounds for termination. If the decision, after hearing, is against termination of the contract, the charges and the record of the hearing shall be physically expunged from the minutes, and if the teacher has suffered any loss of salary by reason of being suspended, he shall be paid his full salary for the period of such suspension.

Any teacher affected by an order of termination of contract may appeal to the court of common pleas of the county in which the school is located within thirty days after receipt of notice of the entry of such order. Such appeal shall be an original action in said court and shall be commenced by the filing of a petition against such board, in which petition the facts shall be alleged upon which the teacher relies for a reversal or modification of such order of termination of contract. Upon service or waiver of summons in said appeal, such board shall immediately transmit to the clerk of said court for filing a transcript of the original papers filed with the board, a certified copy of the minutes of the board into which the termination finding was entered, and a certified transcript of all evidence adduced at the hearing or hearings before such board or a certified transcript of all evidence adduced at the hearing or hearings before the referee, where-

upon the cause shall be at issue without further pleading and shall be advanced and heard without delay. The court shall examine the transcript and record of the hearing and shall hold such additional hearings as it deems advisable, at which it may consider other evidence in addition to such transcript and record.

Upon final hearing, the court shall grant or deny the relief prayed for in the petition as may be proper in accordance with the evidence adduced in the hearing. Such an action is a special proceeding within the purview of section 2505.02 of the Revised Code and either the teacher or the board may appeal therefrom.

In any court action the board may utilize the services of the prosecuting attorney or city solicitor as authorized by section 3313.35 of the Revised Code, or may employ other legal counsel.

STIPULATION OF FACTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CLIFFORD JONES, Plaintiff,	Civil Action No. 8785
vs.	Judge Hogan
WILLIAM M. MORRIS, et al., Defendants.	**STIPULATION OF FACTS**

It is hereby stipulated between the plaintiff and the defendant, Mt. Healthy Board of Education, as to the following facts and exhibits:

1. That on April 5, 1973, the Mt. Healthy Board of Education sent a letter to plaintiff advising him of the Board's intention to consider the termination of his current continuing teaching contract on eight different grounds. Exhibit "A"

2. That on April 10, 1973, counsel for plaintiff wrote a letter to the Board demanding a public hearing before a Referee. Exhibit "B"

3. That a hearing was commenced before Referee Larry A. Smith on May 11, 1973, and continued on May 12, 19, 21, June 1, 2, 9 and 16, 1973, and twenty (20) witnesses testified at said hearing.

4. That on June 23, 1973, a Saturday, the report of the Referee Larry A. Smith was received by both parties, and that said report recommended that the continuing teaching contract of plaintiff be terminated. Exhibit "C"

5. That on June 25, 1973, the Board met at its regularly

scheduled meeting and, at said meeting, the Board voted to accept the report of the Referee and also voted to terminate the continuing teaching contract of the plaintiff on the grounds set forth in the report. (Minutes of the Board of Education) Exhibit "D"

6. Neither plaintiff nor his counsel were present at said Board meeting on June 25, 1973, nor were they specifically notified of said meeting.

7. That on the said June 25, 1973, counsel for plaintiff wrote a letter to the clerk of the Board requesting a hearing before the Board, notice of said hearing, and a copy of the transcript. Exhibit "E"

8. That on June 27, 1973, the Clerk-Treasurer of the Board notified plaintiff that the Board voted to terminate his contract as of June 25, 1973, and that the letter of June 25 (Exhibit "E") had been received by the Clerk-Treasurer on June 26, 1973, and would be presented to the Board at its next regular meeting on July 23, 1973. Exhibit "F"

9. That on July 6, 1973, counsel for plaintiff moved to amend the existing complaint he had filed in the district court by adding "Count V". Exhibit "G"

10. That on July 17, 1973, counsel for plaintiff filed a petition in the Common Pleas Court of Hamilton County, Ohio, pursuant to Ohio Revised Code Section 3319.16, appealing the termination of his continuing teaching contract. Exhibit "H"

11. That counsel for plaintiff appeared at the Board meeting of July 23, 1973, and requested that he be heard at a special meeting of the Board at a future date, and that Board members read the transcript when it was available. (Minutes of the Board) Exhibit "I"

12. That on August 9, 1973, counsel for the Board wrote to counsel for plaintiff advising him of the Board action. Exhibit "J"

13. That the transcript of the hearing totalled 1605 pages, included 90 exhibits and was not delivered to the Board until November 28, 1973.

14. That Section 3319.16 and 3319.161, Ohio Revised Code, are as set forth. Exhibit "K"

15. That the opinion of the Hamilton County Common Pleas Court is as set forth herein. Exhibit "L"

16. That the opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, is as set forth herein Exhibit "M"

17. On December 15, 1978, the Ohio Supreme Court denied certiorari of the case No. 78-1322 (Sup. Ct. Ohio 1978). Exhibit "N"

/s/ Paul H. Tobias
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Attorney for Plaintiff Clifford Jones

/s/ Philip S. Olinger
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Attorney for Defendant, Mt. Healthy
Board of Education

CERTIFICATE OF SERVICE

I hereby certify that three copies of Appellant's Amended Appendix to the Jurisdictional Statement were served by deposit in a U.S. post office box, with first-class postage prepaid, upon counsel for all of the parties required to be served: Philip Olinger, Esq., 115 Fieldstone Drive, Terrace Park, Ohio 45174, on the 18th day of January, 1982, in accordance with the provisions of Rule 28.

.....

Paul H. Tobias

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
FEB 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1356

In the

Supreme Court of the United States

October Term, 1981

CLIFFORD JONES,

Appellant,

v.

WILLIAM M. MORRIS, *et. al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, Western Division

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MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Is the due process issue in § 3319.16 Ohio Revised Code so substantial as to require review after the Ohio courts and a three-judge federal district panel have both held that the statute is consistent with all constitutionally guaranteed due process requirements?

2. Is appellant entitled to a review after he failed to appeal to this Court from an adverse ruling in the state courts on the same issue?

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No. 81-1356

In the

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CLIFFORD JONES,

Appellant,

v.

WILLIAM M. MORRIS, *et. al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, Western Division

MOTION TO DISMISS OR AFFIRM

The appellee, Mt. Healthy City School District Board of Education, respectfully moves the Court to dismiss or affirm the judgment of the United States District Court for the Southern District of Ohio in this case on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment entered in favor of the Mt. Healthy Board of Education on August 28, 1981 by a district court of three judges constituted pursuant to 28 U.S.C. § 2281 (repealed 1976). The case was tried upon a stipulation of fact.

The appellant, Clifford Jones, was a tenured teacher in the Mt. Healthy school system. The appellee Board of Education terminated his employment in 1973 pursuant to the detailed provisions of Ohio Rev. Code § 3319.16. The Board notified Jones on April 5, 1973 that it intended to consider terminating his contract for the coming year and listed eight grounds for its decision. Under the provisions of Ohio Rev. Code § 3319.16, appellant had the option of contesting his termination through a hearing before a referee selected by the parties; who would make a report and recommendation to the Board of Education or through a hearing conducted by the Board of Education itself. The first option required the Board of Education to act on the referee's report. In either case, Ohio Rev. Code § 3319.16 also provided for judicial review by a Court of Common Pleas.

Jones elected to contest his termination in a hearing before a referee. At the hearing, he was represented by counsel and was permitted to present evidence and cross-examine adverse witnesses. This hearing lasted eight days, after which the referee prepared a written report setting forth his findings and conclusions. Of the eight grounds originally set forth, the referee determined that four had merit and constituted just cause for Jones' termination. The report was presented at a regularly scheduled meeting of the Board of Education where the members discussed and considered it. After the discussion, the Board voted to accept the report and to terminate Jones' contract for the reasons set forth in the referee's report. The day after the Board voted, the Board received a letter from appellant's counsel seeking a hearing before the board itself with respect to the termination. The Board did not provide any further hearing, nor was any further hearing required by Ohio Rev. Code § 3319.16.

Jones had brought action in the District Court challenging his suspension pending the termination proceeding.

After the Board terminated him, he amended that complaint to challenge the procedures set forth in Ohio Rev. Code § 3319.16. He also availed himself of his right of appeal to the Court of Common Pleas pursuant to Ohio Rev. Code § 3319.16. The District Court abstained while Jones pursued his state court remedies. He developed his constitutional arguments in the state courts, at first succeeding in the Court of Common Pleas. However, the Court of Appeals for the First Appellate District of Ohio reversed, holding that Ohio Rev. Code § 3319.16 did not violate Jones' right of due process. *Jones v. Board of Education*, 60 Ohio App. 2d 138, 14 Ohio Ops. 3d 108 (Hamilton Co. 1978). Jones' appeal to the Ohio Supreme Court was dismissed for want of a substantial constitutional question, and he made no attempt to seek review by the United States Supreme Court. Instead, he returned to the District Court to argue once against his contention that Ohio Rev. Code § 3319.16 is violative of due process. That court also concluded that the statute is consistent with due process as guaranteed by the United States Constitution.

ARGUMENT

I. OHIO REV. CODE § 3319.16 ON ITS FACE AND AS APPLIED IN THIS SPECIFIC CONTROVERSY IS CONSISTENT WITH ALL CONSTITUTIONALLY GUARANTEED DUE PROCESS REQUIREMENTS

In order to fully appreciate the due process protection afforded by Ohio Rev. Code § 3319.16, it is critical to understand the detailed procedures afforded a tenured teacher whose contract is terminated by a board of education. Before terminating a contract, the board must first submit a written notice to the teacher indicating the board's intent to consider termination and specifying the grounds therefor.

The board cannot proceed with formal action "until after the tenth day after receipt of such notice by the teacher." Within ten days of receipt the teacher may request a hearing *either* before the board itself *or* before a referee. The teacher is entitled to twenty days notice of the time and place of the hearing. A complete stenographic record of the hearing (with a copy furnished to the teacher) is required.

The parties are entitled to be represented by counsel, to have sworn testimony, to cross-examine adverse witnesses, and to compel attendance of witnesses through subpoena. If the hearing is by referee, his report is submitted to the board within ten days. The board must consider the referee's report and recommendation and vote to accept or reject the recommendation. The board must set forth the reasons for termination, if such is its decision.

The teacher then has the right to appeal an order of termination to the Court of Common Pleas within thirty days after receipt of notice of termination. The board is required to transmit to the court a complete transcript of the proceedings as well as all original papers and minutes of the board. The matter is advanced on the court's calendar, and the court reviews the proceedings below, holds whatever additional hearings and takes whatever additional evidence it deems advisable, and renders its decision. That decision is appealable to the Court of Appeals.

From the foregoing, it is readily apparent that the statutory procedure for review of a termination is replete with procedural safeguards for an aggrieved teacher. Appellant's attack on the statute fails to reckon with the full panoply of such safeguards.

Appellant's first argument in his Jurisdictional Statement suggests that Ohio Rev. Code § 3319.16 does not require a board of education to base its decision on the evidence. However, the statute specifically states:

> *After consideration* of the referee's report, the board by a majority vote may accept or reject the referee's recommendation on the termination of the teacher's contract. (emphasis added)

In other words, a board of education must first consider the evidence submitted in the report before it votes on the recommendation. To read that provision as appellant does robs it of its meaning. The statute requires the board to review the evidence.

The most significant defect in appellant's due process argument, however, is his failure to acknowledge the totality of the review process established by Ohio Rev. Code § 3319.16. By beginning and ending his argument with the board's consideration of the referee's report and recommendation, he simply misses the thrust of the statute. A teacher terminated either by virtue of a referee's hearing and board review or by the board's hearing is entitled to appeal to the Court of Common Pleas where his appeal is advanced on the docket, a complete transcript is provided, and additional evidence and hearings are permitted. The judge of the Court of Common Pleas decides the termination issue on the basis of all the evidence thus brought before the court. This procedure does not exist by virtue of any general administrative appeal provision or by virtue of local custom. It exists because of Ohio Rev. Code § 3319.16. In other words, the Ohio courts, by statute, have been made an integral part of this specific process of review. It is disingenuous to analyze the teacher termination review process without acknowledging that the final reviewer is a duly elected judge who has before him a complete record of proceedings. It is inconceivable how due process can be better served.

In his discussion of the case law, it is noteworthy that Jones has chosen to ignore this Court's most applicable de-

cision, *Arnett v. Kennedy*, 416 U.S. 134 (1974). *Arnett* involved a due process challenge by a nonprobationary employee of the Office of Economic Opportunity who was discharged pursuant to the procedures set forth in the Lloyd-LaFollette Act, 5 U.S.C. 7501. The Act provides for removal of nonprobationary federal employees only for "cause" and requires the employing agency to furnish the employee with written notice of the proposed removal. The agency must also permit the employee to respond in writing and promptly furnish him with the agency's decision. The Act itself indicates that examination of witnesses, trial, or hearing is not required but is discretionary. The agency procedure used in *Arnett* was more expansive in that it mandated a post-removal evidentiary trial-type hearing if the employee so elected. The discharged employee contended that due process required a trial-type hearing before an impartial hearing officer prior to removal.

The Court held that the termination procedures were not violative of due process. In distinguishing such earlier cases as *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Bell v. Burson*, 402 U.S. 535 (1971), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), Justice Rehnquist writing for the plurality stated:

> "These cases deal with areas of the law dissimilar to one another and dissimilar to the area of governmental employer-employee relationships with which we deal here. The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." 416 U.S., at 155.

The decision went on to say, "Here the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest." *Id.* In other words, it is

only by virtue of legislative enactment that a governmental employee has any protection against removal without cause; there is no constitutional violation if, at the same time, the legislature also provides that the determination of cause can be made without all the rights attendant to a trial-type adversary hearing. *Id.*, at 153. Moreover, ". . . a hearing afforded by administrative appeal procedures *after* the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." *Id.*, at 157 (emphasis added).

With respect to whether an evidentiary hearing is required prior to termination, Justice Powell's concurring opinion employed a balancing test. Balanced against the employer's interest in employee efficiency and discipline, administrative costs, and expeditious resolution is the employee's interest in continuation of public employment. In resolving the issue in favor of the government employer, Justice Powell specifically distinguished the situations involving prehearing terminations of welfare benefits in *Goldberg v. Kelly*. While the termination in *Goldberg* meant the deprivation of "the very means by which to live," a public employee "may well have independent resources to overcome any temporary hardship, and he may be able to secure a job in the private sector. Alternatively, he will be eligible for welfare benefits." *Arnett*, 416 U.S., at 169.

Subsequent to *Arnett*, the Supreme Court reviewed the problem of terminating Social Security disability benefits prior to hearing. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Again, the Court distinguished the unique circumstances in *Goldberg* and held that an evidentiary hearing was not required in advance:

> "All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' *Goldberg v. Kelly*, 397 U.S., at 268-269 (footnote omitted), to in-

> sure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See *Arnett v. Kennedy*, 416 U.S., at 202 (WHITE, J., concurring in part and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action but also assure a right to an evidentiary hearing, *as well as to subsequent judicial review, before the denial of his claim becomes final*. Cf. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).
>
> We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process." 424 U.S., at 349 (emphasis added).

Judged by the due process standards enunciated in *Arnett* and *Mathews*, it is clear that Ohio Rev. Code § 3319.16 passes constitutional muster. Prior to any decision to terminate a teacher, a board of education is required to provide detailed notice of the grounds for its desire to terminate. Two different hearing opportunities are provided, either before a referee or before the board itself. Both hearings are formal evidentiary proceedings. If the choice is to go before a referee, the board is required to review his report of the hearing and his recommendation on termination prior to voting on the question. It is not until this point that termination can occur. The teacher then has a right to appeal to court in an expedited proceeding with a full transcript, and the court can hold additional hearings and review additional evidence. The court becomes the final decision-maker. In *Arnett*, the regulatory framework at

issue provided for much less in the way of pretermination hearing and nothing in the way of *actual* post-termination judicial hearing and review. *See, e.g., Arnett*, 416 U.S. 134, 143-148, at fns. 9-15.

There simply is no basis to conclude that Ohio Rev. Code § 3319.16 is lacking in due process guarantees. To the contrary, it is a particularly elaborate procedural scheme which provides a teacher with a choice of two initial hearing routes plus full judicial review, including a potential opportunity to present additional evidence. As the District Court concluded in its decision:

> "All of the procedures in the statute, including the provision for plenary review by a common pleas court, ensure that there will be small margin for unfairness which will minimize charges for error in a termination proceeding. Clearly, a common pleas court is a more competent forum for a review of the sufficiency of the evidence than a school board. The board's decision, that the referee's findings constitute sufficient cause to terminate a teacher, is an act within their particular expertise, which, however, is also subject to review if not supported or warranted by the evidence adduced at the hearing." (App. 17a)

Arnett and *Mathews* have firmly established the due process parameters in cases such as this. The decision of the District Court properly analyzed Ohio Rev. Code § 3319.16 and its application to Jones. Further review by this Court is unwarranted.

II. APPELLANT IS NOT ENTITLED TO REVIEW BECAUSE HE DID NOT PURSUE AN APPEAL TO THE UNITED STATES SUPREME COURT FROM THE ADVERSE JUDGMENT OF THE OHIO COURTS

Appellant attempted to pursue his constitutional argument in the District Court as well as the state courts. The

District Court initially abstained while the state action was pursued. After litigating through the Hamilton County Court of Common Please, the Court of Appeal for the First Appellate District, and the Ohio Supreme Court, Jones chose not to petition this court for certiorari but instead returned to the District Court to pursue once again his due process arguments. The District Court, *sua sponte*, determined that it could decide these issues anew. Thereafter, the parties briefed the res judicata question to the three-judge panel, but the court did not address the question in its Opinion and Order. Nevertheless, this Court should not permit the Ohio courts' conclusive determination as to appellant's constitutional rights to be disregarded.

The published decision of the Ohio Court of Appeals, *Jones v. Board of Education*, 60 Ohio App. 2d 138, 14 Ohio Ops. 3d 108 (Hamilton Co. 1978), on its fact demonstrates that Jones argued the same constitutional issues that he later addressed to the District Court and now to this Court. The Ohio Supreme Court dismissed his appeal for lack of a substantial constitutional question. Jones not only had the right to raise his arguments in the state courts, but he took the opportunity to do so. That litigation was concluded in 1978.

In *England v. Medical Examiners of Louisiana*, 375 U.S. 411, 419 (1963), this Court held

> ". . . that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates it there, and has them decided there, then-whether or not he seeks direct review of the state decision in this Court-he has elected to forego his right to return to the District Court."

See also *Montana v. United States*, 440 U.S. 147 (1979).

Even more recently, the Supreme Court decided specifically that the rules of res judicata and collateral estoppel

are applicable to actions such as this which are brought under 42 U.S.C. § 1983. *Allen v. McCurry*, 449 U.S. 90 (1980). *Allen* held that the only obstacle to the preclusive effect of a state court judgment is the failure to provide "a full and fair opportunity to litigate the claim or issue decided by the first court." 449 U.S., at 101. More specifically,

> ". . . nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights." 449 U.S., at 103-104.

There is no good reason to disregard this rather clear principle of judicial administration, particularly in a situation such as this where the issue is the constitutionality of a complex procedural statute which is unique to the state whose courts have made the review. This reason alone is grounds for dismissal of the appeal.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or the judgment below affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 1982, three copies of the Motion to Dismiss or Affirm were mailed, postage paid, to Paul H. Tobias, Esq., 911 Clopay Bldg., 105 E. Fourth Street, Cincinnati, Ohio 45202, Counsel for Appellant.

PHILIP S. OLINGER

Appendix

APPENDIX A
REPORT OF REFEREE, LARRY A. SMITH

The following findings and recommendations results from the Board of Education having given notice to Clifford Jones of its intention to consider the termination of his continuing contract. A Referee was requested under the provisions of Section 3319.16 Revised Code, and a lengthy hearing was held on the following days in 1973: May 11th, May 12th, May 19th, May 31st, June 1st, June 2nd, June 9th, and June 16th.

After listening to the testimony and reviewing the Board's exhibits 1 through 22 and Jones' exhibits A through AAA, AAA1 through AAA12, this Referee has now formulated findings and recommendations.

The following discussion of specific incidents is in no way intended to limit the consideration of the charges to the incidents discussed. The record is replete with numerous other incidents, but in the interests of brevity I have chosen the following for illustration.

The evidence shows that in March of 1971 a certain Richard Pardini, who was a teacher at the Hoop-Hunt Elementary School came to Greener Elementary School, where Jones taught, for the purpose of inserting a mimeographed letter into the teachers' mail boxes. This mimeographed letter urged teachers to think before they voted on a question of whether or not to strike.

Jones confronted Pardini and within the hearing of other teachers shouted at Pardini, called Pardini a scab, and ordered him to leave the building.

Emotions always run high where there is a possibility of a strike. The fact that there is little or no evidence that the confrontation took place in front of children would lead me to completely dismiss this incident from my mind, were it

not for what followed. Shortly thereafter, Mrs. Jean Aston called Jones into the privacy of her office to reprimand him for his conduct. There were no other persons present. She began by tapping her pointed index finger several times upon her desk and saying "I will not tolerate this kind . . .". Before she could finish, Jones got up out of his chair, left her office, and went out into the hall to get "witnesses".

Up to this day, there is no evidence in the record that Clifford Jones believed himself to be the target of any harrassment campaign by the administration. There is no question, however, that Jones was being reprimanded by Aston.

When asked, during cross-examination, why he felt it necessary to have witnesses, Jones replied that the administration always had witnesses. This is a rather weak response from one who has not had previous trouble with the administration.

There is a strong inference that the purpose of the "witnesses" was to intimidate the principal and thus prevent her from reprimanding Jones or even discussing the matter in private with him.

Early in the next school year (1971-1972) the Superintendent of the school system instituted a district wide program of placing greater emphasis on lesson planning with behavioral objectives as part of the lesson plan. This was met by hostility and resentment on the part of many teachers, and, in fact, one teacher testified that she became nauseated. Evidence was presented from which one could draw the inference that the resentment came about as a result of the lesson plans taking more working time. Evidence was also presented from which one could draw the inference that the lesson plans enabled the administration to more closely supervise the activities of the teachers.

Appendix

While Jones appreared to have some initial trouble doing lesson plans, he nevertheless progressed to the point where his lesson plans were at least satisfactory. After the Christmas vacation, in that school year, the principal let it be known that teachers no longer had to turn copies of their weekly lesson plans into her, but should nevertheless continue to do lesson plans in the manner they had previously done them.

A comparison of exhibits 6 and 7 tends to indicate that Jones did not continue to do lesson plans as he had previously prepared them. Mr. Jones contends that:

1. He continued to do lesson plans, but in the manner in which he chose to prepare them, and
2. His lesson plans were just as good as other teacher's lesson plans.

It was not his prerogative to choose the manner in which he prepared his lesson plans. Whether or not his lesson plans were as good as other teachers' is irrelevant, if his lesson plans were not up to standards.

Continued suggestions and directives concerning lesson plans, the conduct of his class, and further utilization of additional teaching materials were met with repeated assertions by Jones that he was either already doing that which was suggested, he was doing what was suggested as well as any other teacher, or that it was not necessary to do what was suggested.

In the Spring of 1972, Aston recommended that transfer of Jones be made to another elementary school. Jones was transferred to the Hoop-Hunt Elementary School, and was notified that he was placed on probation.

Appendix

A Mr. Cecil E. Roebuck was the principal of the Hoop-Hunt School in the Fall of 1972. Roebuck called Jones into his office to discuss his probationary status. At that meeting, Roebuck told Jones that he had possession of Jones' complete record from the Greener Elementary School. Roebuck further indicated that he had not reviewed it. He thereupon put the entire record in an envelope and sealed it. This was Roebuck's way of letting Jones know that as far as Roebuck was concerned Jones was starting afresh.

During this period of time, Jones was observed more frequently than other teachers. I do not find this unusual in view of his "probationary" status.

In the Fall of 1972, Roebuck announced his intention to retire. Pardini, who was by then the assistant principal at Hoop-Hunt was promoted to principal.

During the Fall of 1972, it was made abundantly clear to Jones that great emphasis would be placed on his classroom planning. Nevertheless, in February of 1973, when Mr. Jones became ill, there were little or no lesson plans available to the substitute teacher.

Jones gives several reasons for this state of affairs:

1. He had never missed school because of sickness before (which indeed appears to be true).
2. That his plans were enough for a substitute to proceed.
3. That if his plans were not enough for a substitute to proceed, he could be called at home.

After Jones returned to school, Pardini, the principal, called Jones to his office and asked him repeatedly three questions:

1. Whether or not he was going to have a lesson plan at all times.

2. Whether or not he was going to have a seating chart, which had been required during his tenure.
3. Whether or not he was going to have a class register and grade book available at all times, these being absent in his absence.

As Jones immediate superior, Pardini had the right to ask the questions and demand answers. Jones refused to answer the questions. The refusal to answer those questions was a singular act of insubordination.

Pardini testified that he had not forgotten the incident previously referred to which occurred in the Spring of 1971. Pardini also testified that he bore no ill will toward Jones because of this incident. Indeed, if Pardini had borne a grudge against Jones and was determined to get rid of Jones from the very beginning, he certainly concealed his intentions with great subtlety by complimenting Jones in the observation reports (exhibits N and O). Those teachers who testified on behalf of Jones rated Pardini from anywhere from a basically fair person to "fantastic".

With the exception of Mrs. DeVan and Mr. Hinton, those teachers who testified on behalf of Jones characterized Jones' difficulties with the administration as unfortunate personality conflicts. One can overlook a personality conflict between any two given persons, but this appears to be a developing pattern for Mr. Jones, starting in the Spring of 1971. The only person Mr. Jones appears to have had no conflicts with, who was in a supervisory position to him from the Spring of 1971 to the Spring of 1973 was Mr. Roebuck. However, Mr. Roebuck concluded that Mr. Jones should be terminated.

LAW

Section 3319.16 reads as follows in the first sentence:

> "A contract of a teacher may not be terminated except for gross ineffeciency or immorality; for willful and persistent violations of reasonable regulations of the board of education, or for other good and just cause."

One can, therefore, conclude from that sentence that any cause must be good and just and the specific references to gross ineffeciency or immorality, willful and persistent violations of reasonable regulations of the board of education are for the purpose of illustrating a degree of seriousness of misconduct which the legislature of Ohio considers to be a "good and just cause". In other words a good and just cause must be at least equal to the seriousness of gross ineffeciency or immorality or for willful and persistent violations of the reasonable regulations of the board of education.

The Tenure Act (Section 3319.11 R.C.) does not have the effect of rendering any "good and just cause" any less good and just when applied to tenured teachers. It does, however, effectively require a thorough investigation of the entire case to see whether or not, in fact, a good and just cause exists.

It serves no purpose to engage in fruitless quibbling over the semantic nicities of classifying the charges against Jones. That is, I do not feel it necessary to decide whether or not the specified charges fall into the category of gross ineffeciency or whether those charges fall into the category of "other good and just cause". All grounds must be good and just. Therefore, the only thing that is important in the specified charges is whether or not the charges are "good and just cause" and whether or not they are specific enough to allow the teacher to frame a defense against the charges.

I find the charges contained in the letter of April 5, 1973 (exhibit 1) and numbered 1 through 8 are sufficiently detailed to enable Jones to frame a defense and to apprise him

of the nature of the evidence that will be brought against him.

At the end of the Board's case, I dismissed charges numbered 4, 5, 7 and 8. Those charges were dismissed not because they were not sufficiently serious, but rather because there is no evidence tending to support number 8 and the evidence supporting 4, 5 and 7 tends to show that the incidents recounted were relatively minor.

I find that the actions specified in charges number 1 through 3 and charge number 6 existed in such degree and continued over such a period of time as to amount to insubordination.

Clifford Jones reaction to directives and orders from those in a supervisory position to him ranged from overt belligerence and hostility to willful refusal to carry out directives and orders. In short, for a period of some two years there were deliberate violations of those standards of conduct which the employer could rightfully expect.

In reaching this conclusion, I am not unmindful that the evidence tends to show that Jones had good relations with his fellow teachers and was dedicated to his students. Nevertheless, with respect to his relations with those who were in a superior position to him, I find that rather than being a victim of the circumstances he primarily precipitated those circumstances.

It is not without lack of feeling nor without regret that I find adequate grounds to exist for his termination and, I further recommend that his contract be terminated.

YOUNG, PRYOR, LYNN & FALKE

By _____
Larry A. Smith, Referee
appointed pursuant to
Section 3319.16 R.C.

APPENDIX B
JONES, APPELLEE, v. BOARD OF EDUCATION, MT. HEALTHY CITY SCHOOL DISTRICT, APPELLANT.*

PALMER, P.J. In April 1973, plaintiff-appellee, Clifford Jones, received notice from the defendant-appellant, the Board of Education of Mt. Healthy City School District, that the board was considering the termination of Jones' teaching contract "for gross inefficiency and for other good and just cause." In response, Jones timely filed a written demand for a public hearing, electing to have the hearing held before a referee rather than before the board pursuant to R.C. 3319.16. A lengthy evidentiary hearing was accordingly held before the referee below, at the conclusion of which the referee submitted a report to the board recommending the termination of Jones' contract. Jones thereafter demanded an additional hearing before the board to refute the findings and recommendations contained in the referee's report. The board refused Jones' request for a further hearing and, at a subsequent meeting, voted to accept the referee's recommendation and terminate Jones' contract. Jones appealed the board's decision to the Court of Common Pleas in accordance with the provisions of R.C. 3319.16, asserting in his petition and, subsequently, in his motion for summary judgment, that the board had acted improperly in denying the appellant his claimed statutory and constitutional rights to an additional hearing before the board to challenge the contents of the referee's report. The trial court agreed, granting Jones' motion for summary judgment, vacating the board's termination of Jones' contract and ordering his reinstatement with full payment of

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* Reporter's Note: A motion to certify the record was overruled by the Supreme Court of Ohio, December 15, 1978.

any salary lost as a result of such termination. The board timely filed this appeal from the trial court's judgment, presented three assignments of error for review.

The board, in its first assignment, asserts that the trial court erred in ruling that Jones was entitled, under the provisions of R. C. 3319.16, to a pre-termination hearing before the board in addition to the full evidentiary hearing which he elected to have before the referee below. The statutory language at issue provides, in pertinent part:

"***Within ten days after receipt of the notice [of termination] from the clerk of the board, the teacher may file with the clerk a written demand for a hearing before the board or before a referee***. The hearing shall be private unless the teacher requests a public hearing. The hearing shall be conducted by a referee appointed pursuant to section 3319.161 (3319.16.1) of the Revised Code, if demanded; otherwise, it shall be conducted by a majority of the members of the board and shall be confined to the grounds given for the termination.***

"Both parties may be present at such hearing, be represented by counsel, require witnesses to be under oath, cross-examine witnesses, take a record of the proceedings, and require the presence of witnesses in their behalf upon subpoena to be issued by the clerk of the board.*** Any member of the board or the referee may administer oaths to witnesses. *After a hearing by a referee*, the referee shall file his report within ten days after the termination of the hearing. After consideration of the referee's report, the board by a majority vote may accept or reject the referee's recommendation on the termination of the teacher's contract. *After a hearing by the board*, the board by majority vote may enter its determination upon its minutes." (Emphasis added.)

Appellee Jones contends that the final sentence of the above quoted language—prefaced as it is by the words "after a hearing by the board"—invests him with an absolute right to a hearing before the board at some point prior to the termination of his teaching contract, whether or not he originally had elected to avail himself of the opportunity to be heard by an impartial referee. The appellant, on its part, argues that the language cited by Jones in support of his claimed right to a hearing before the board is inapplicable to cases where, as here, a teacher had chosen to present his case to a referee. The phrase, "after a hearing by the board," the board asserts, is intended to preface a description of the procedure to be followed only when a teacher originally has elected to have his termination hearing before the board; the provision is parallel with, and not sequential to, the preceding two sentences of the statute which, the board suggests, delineate fully and exclusively the procedures to be followed "after a hearing by a referee," and which do not include the right to an additional hearing before the board.

A careful review of the pertinent statutory language compels our conclusion that the interpretation of R. C. 3319.16 urged by the board herein is the correct one. The statute clearly contemplates and carefully delineates two distinct and, in our opinion, mutually exclusive avenues for the resolution of disputes involving the termination of a teacher's contract. A teacher may choose to present his case directly to the board that has preferred charges against him, after which the board may promptly vote on the termination of the teacher's contract. Alternatively, the teacher may elect to have his case heard by an impartial referee, at the conclusion of which the referee reports his findings and recommendations to the board. The board,

after reviewing the report, may immediately vote to accept or reject the recommendations contained therein and, thus, to terminate or continue the teaching contract in question; the statute plainly interposes no requirement that a teacher be afforded an opportunity to refute the contents of a referee's report in the period between the filing of the report and its acceptance or rejection by the board. To hold, as Jones suggests, that the carefully maintained distinctions between the two types of proceedings developed in R. C. 3319.16 should be abruptly dissolved in order to afford Jones the right to an additional hearing before the board prior to the termination of his contract thus would not only offend a fundamental tenet of statutory construction—*viz.*, that a statute must be construed so as to carry its plainly perceivable scheme or design into effect [1]—but would do violence to the plain language of the statute itself. We therefore conclude that the trial court erred in holding that the provisions of R. C. 3319.16 entitled Jones to a separate pre-termination hearing before the board in addition to the hearing which Jones elected to have before the referee below,[2] and we accordingly sustain the board's first assignment of error.

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[1] See *Logan Natural Gas & Fuel Co.* v. *Chillicothe* (1901), 65 Ohio St. 186, and *State, ex rel. Cromwell* v. *Myers* (1947), 80 Ohio App. 357.

[2] Our conclusion that Jones was entitled, under R.C. 3319.16, to a single hearing only—either before a referee or before the board—is supported by other language in the statute setting forth the procedures for judicial review of the board's decision, as follows:

"Any teacher affected by an order of termination of contract may appeal to the court of common pleas ***, *** Upon service or waiver of summons in said appeal, the board shall immediately transmit to the clerk of said court for filing *** a certified transcript of all evidence adduced at the hearing or hearings before the board *or* a certified transcript of all evidence adduced at a hearing or hearings before the referee ***," R.C. 3319.16. (Emphasis added.)

Having thus determined that Jones, having once had a full hearing before a referee, has no right to a separate hearing before the board under the provisions of R. C. 3319.16, we are confronted with the issue raised in the board's second assignment of error: whether the statute, so construed, violates Jones' constitutional right to due process of law. The court below expressed its belief that R. C. 3319.16, in order to be held constitutional, must be so construed as to afford a teacher an absolute right to be heard by the board—which the court characterized as the ultimate "decision maker" in these proceedings—even in those cases where a teacher has exercised his right to be heard by a referee. We disagree. R. C. 3319.16 does in fact confer upon a teacher the right, in the first instance, to personally appear before the board in order to defend himself against the charges which it has brought against him. However, a teacher may, when it is in his best interest to do so, freely elect to completely bypass any such opportunity to present his defense directly to his accusers in favor of proceeding before a more neutral and detached tribunal—*viz.*, a referee appointed pursuant to R. C. 3319.16. Moreover, regardless of the forum in which a teacher initially elects to proceed, the final termination decision of the board may be directly appealed to the court of common pleas, which, in addition to reviewing the record of the administrative proceedings below, may hold further hearings, permitting the parties to introduce other evidence in addition to that adduced in the administrative hearing. R. C. 3319.16.

The constitutional propriety of this elective statutory scheme under due process standards was recognized, in no uncertain terms, by the United States Court of Appeals for the Sixth Circuit in *Whitsel* v. *Southeast Local School District* (C.A. 6, 1973), 484 F. 2d 1222, a case neither cited nor

discussed in the briefs or arguments of either of the parties in this appeal. In *Whitsel*, the plaintiff's continuing teaching contract was terminated by the defendant board of education after the plaintiff had elected to have his hearing before the board rather than before a referee. The plaintiff brought the federal action alleging, *inter alia*, that he was denied due process of law in the hearing accorded him under R. C. 3319.16 because the defendant board acted as both accuser and trier of fact at the hearing (a claim which, we note, might just as well have been asserted by Jones in the instant case had his request for an additional hearing before the board been granted in the administrative proceedings below). The Court of Appeals rejected the plaintiff's claim, noting that the plaintiff could have demanded a hearing before an impartial referee but chose not to do so, stating:

"The pertinent Ohio statute [R. C. 3319.16] specifies the grounds for termination of a continuing contract, requires written notice and time to prepare a defense, *and provides the option of requesting a referee to conduct the hearing instead of the school board*, a stenographic record, the right of confrontation, the right to counsel, and the right to subpoena witnesses. It also provides for plenary review of an order of termination in the state courts. Tested by every standard ever enunciated, these rights constitute procedural due process in a contract termination proceeding. See *Perry* v. *Sindermann*. [408 U.S. 593 (1972)]***. *Id.*, at 1229. (Emphasis added.)

We find the Court's holding in *Whitsel* to be dispositive of the constitutional issues presented for determination in the instant appeal. The cases cited by Jones in support of a contrary result—*viz.*, *Goldberg* v. *Kelly*, (1970), 397 U.S. 254, *Kinsella* v. *Board* (W.D. N.Y. 1974), 378 F. Supp. 54,

and *State* v. *Carroll* (1977), 54 Ohio App. 2d 160—all present situations in which the statutory scheme at issue either absolutely denied an aggrieved party any opportunity to choose to appear before the respective decision-making agency, or failed to require that the termination decision be based upon the evidence adduced at the administrative hearing—neither of which defects is present in R.C. 3319.16—and are thus inapposite to the case before us.

We therefore conclude that the trial court erred in ruling that R.C. 3319.16, as herein construed, was violative of Jones' constitutional right to due process of law. The board's second assignment of error is, therefore, well-taken, and is accordingly sustained.

The board's third assignment of error, challenging that part of the judgment below awarding back pay to Jones during the term of his allegedly unlawful termination, is mooted by our disposition of the foregoing two assignments of error, and is accordingly overruled.

The judgment of the court below must be, and hereby is, reversed.

Judgment reversed.

SHANNON and KEEFE, JJ., concur.

Appellant's Reply Brief

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No. 81-1356

In the

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October Term, 1981

CLIFFORD JONES,

Appellant,

v.

WILLIAM M. MORRIS, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, Western Division

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APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Appellee's motion has no merit. Its major argument is that entitlement to judicial review somehow cures any administrative deprivation of due process. Our brief, pages 21-23 cites the weight of authority contra.

Appellee also mistakenly relies on *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). There, six members of this Court disagreed with the notion, expounded by Appellee, that the statute determines not only the nature of the property interest, but also the extent of procedural protection available to an employee. Six members of this court agreed

that the right to procedural due process is one of constitutional guarantee, and not legislative guarantee.

In *Arnett,* the statute provided for a post-discharge hearing by the final administrative decision maker. In *Arnett,* there were no *Morgan* (*Morgan* v. *United States,* 298 U.S. 468 (1936)) issues. Thus, the facts and issues in *Arnett* were totally different from the case at bar.

Appellee says the doctrine of res judicata bars this appeal. Not so. First of all, the defense was not raised until two years after the amended complaint was filed. Under Federal Rule 8(c), Appellee's attempt to amend its answer at the eleventh hour should have been overruled as untimely. Secondly, the district court ruled that "having obtained the authoritative state court construction for which this court abstained" Plaintiff has the "right to return to the District Court for final determination of his claims."[1] Appellee never objected or appealed from this ruling. Thirdly, Appellee should be estopped from now asserting that the issues were identical. Only one year ago, on March 16, 1981, Appellee stated as follows in a brief:

> "The pleadings in the state court are attached as Exhibit H . . . Plaintiff alleged therein that Defendants had failed to comply with the state statute and *did not allege that the state statute was unconstitutional* . . . the record indicates the Plaintiff elected to pursue the statutory appellate procedures rather than enjoin the application of that statute against him." (emphasis ours)

Thus, Appellee conceded that the state court only determined state issues and not federal constitutional issues.

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[1] Decision of District Judge Timothy S. Hogan, dated March 11, 1980.

Plaintiff filed his Section 1983 complaint in 1973. The federal court then abstained and requested Plaintiff to obtain a state court interpretation of ORC 3319.16. The state court ruled that the Ohio statute did not provide for a hearing by the Board. Then Plaintiff returned to federal court for a ruling on the federal issues.

The Court in *Government Employees* v. *Windsor,* 353 U.S. 364 (1956) requires a Plaintiff to ask the state court to interpret a state statute in light of any federal constitutional objections. The Court in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1963), held that,

> "The litigant is in no event to be denied his right to return to the district court unless it clearly appears he did more than *Windsor* required and fully litigated his federal claims in the state courts."

Plaintiff went to the state court relying upon Ohio law. Plaintiff did not seek to enjoin the Ohio statute or have it declared unconstitutional. As required by *Windsor,* he did argue that the statute should be interpreted in light of federal constitutional objections raised in the federal court. Mere compliance with *Windsor,* will not support a conclusion that Plaintiff abandoned his right of return.

After the state trial court ruled in his favor, holding that the statute required a hearing, there was no need to argue, brief or litigate any federal issues. Plaintiff had won on the narrow state issue. Subsequently, the Ohio Court of Appeals disagreed. The Ohio Supreme Court dismissed the appeal without any argument or review of the record stating that "no substantial constitutional questions exist herein." Thus, it is apparent no federal issues of any kind were litigated, much less *fully* litigated before the Supreme Court of Ohio. Just because there was a

close similarity between Plaintiff's arguments on the state issue and on the federal issue does not establish res judicata and does not meet the *England* test.

There was no constitutional decision at the trial level. At all times the sole issue in the state courts was an issue of state law. Federal constitutional law was discussed only as a background. Federal issues were not "fully" litigated and *England* does not apply.

In all events, issues can be split in an abstention case. *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45 (1959).

In sum, the res judicata defense is without merit and was obviously so regarded by the three judge court which did not even discuss the issue.

Respectfully submitted,

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